ENDING IMPUNITY FOR ALL: WHY THE ICC'S OFFICE OF THE PROSECUTOR SHOULD USE THEIR PROSECUTORIAL DISCRETION TO PRIORITIZE THE CRIMES OF THE POWERFUL

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* J.D./Masters of International Affairs 2024, Columbia University. I would like to thank Professors Michael Doyle and Anjli Parrin for all of their guidance and advice in helping me write this Note. I also would like to thank Emily Drake for all of her advice as my Note Editor, as well as all of the friends who supported me along the way.

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INTRODUCTION

Late in the evening on November 28, 2018, a coalition of United States and Afghan forces conducted an airstrike targeting Taliban forces in the southern Afghan province of Helmand.[1] Although the American military reported it was able to kill sixteen members of the Taliban, the airstrike also killed over a dozen Afghan civilians, including five women and twelve children.[2] The vast majority of casualties came from the family of Akhtar Mohammad, a local farmer with no ties to the Taliban whose house was bombed during the United States and Afghan operation.[3] When asked about the civilian deaths, Sergeant First Class Debra Richardson, a spokesperson for the American-led NATO coalition in Afghanistan, stated: "At the time of the strike . . . the ground force was unaware of any civilians in or around the compound; they only knew that the Taliban was using the building as a fighting position."[4] Sadly, since the United States first invaded Afghanistan, Mr. Mohammad's story has become a common one.

This blatant disregard of civilian casualties in conducting military operations has been a pattern of the United States' interventions in Afghanistan. After the United States military "relaxed its rules of engagement for airstrikes in Afghanistan . . . the number of civilians killed by U.S.-led airstrikes in Afghanistan increased by 330 percent."[5] Furthermore, in Afghanistan, Syria, and Iraq, the United States rarely planned its airstrikes in advance, often relying on flawed and insufficient intelligence.[6] After such strikes, the military would "drastically undercount[]" civilian deaths.[7] Out of 1,311 reports, the Pentagon only found one "'possible violation' of the

1. Mujib Mashal & Taimoor Shah, *At Least a Dozen Civilians Killed in Afghan and U.S. Operation*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/world/asia/afghanistan-civilians-killed.html (on file with the *Columbia Human Rights Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Afghan Civilians*, WATSON INST. OF INT'L AND PUB. AFFAIRS AT BROWN UNIV. (Aug. 2022), https://watson.brown.edu/costsofwar/costs/human/civilians/afghan [https://perma.cc/LV6Q-E52W].

6. Michael Levenson, *What to Know About the Civilian Casualty Files*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/2021/12/18/us/airstrikes-civilian-casualty-files-pentagon.html (on file with the *Columbia Human Rights Law Review*).

7. *Id.*

rules of engagement" and had zero findings of wrongdoing or disciplinary action.[8]

American airstrikes in Afghanistan and throughout the Middle East have violated principles of international law by failing to take every feasible precaution to prevent civilian casualties[9] and by engaging in attacks on military objectives that would cause excessive civilian casualties compared to the military advantage gained.[10] These airstrikes, in addition to the regular use of torture by the United States military,[11] led Fatou Bensouda, former Prosecutor of the International Criminal Court (ICC), to announce in 2017 that her office was launching an investigation into the United States' involvement in Afghanistan.[12] In retaliation, the Trump administration revoked Prosecutor Bensouda's visa and threatened to issue economic sanctions against the ICC if the Court continued its investigation.[13] Following these tactics, the ICC Pre-Trial Chamber rejected Prosecutor Bensouda's request to open an investigation into Afghanistan, "citing the volatility surrounding the proposed investigation and the minimal cooperation the Office of the Prosecutor had encountered to date."[14]

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8. *Id.*

9. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 57, 58, *adopted* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [*hereinafter* Protocol I].

10. *Id.*, art. 51(5).

11. *20 Years of US Torture–and Counting: Global Costs of Unlawful Detention and Interrogation Post-9/11*, HUM. RTS. WATCH (Jan. 9, 2022), https://edit.hrw.org/news/2022/01/09/20-years-us-torture-and-counting [https://perma.cc/JV4Y-LYLH].

12. Fatou Bensouda, Statement of ICC Prosecutor, Fatou Bensouda, regarding her decision to request judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan, INT'L CRIM. CT. (Nov. 3, 2017), https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-regarding-her-decision-request-judicial-authorisation [https://perma.cc/5KGL-EVYW].

13. Judith Kelley, *The U.S. Revoked the Visa for the ICC Prosecutor. That Bodes Poorly for International Criminal Justice.*, WASH. POST (Apr. 8, 2019), https://www.washingtonpost.com/politics/2019/04/08/us-revoked-visa-icc-prosecutor-that-bodes-poorly-international-criminal-justice/ [https://perma.cc/77VK-3J66].

14. Sara L. Ochs, *The United States, the International Criminal Court, and the Situation in Afghanistan*, 95 NOTRE DAME L. REV. REFLECTION 89, 90 (2020).

Although Prosecutor Bensouda successfully appealed the decision, current Prosecutor Khan reversed course in September 2021, announcing that he had "decided to focus [his] Office's investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province (IS-K) and to deprioritize other aspects of this investigation."[15] Many critics saw this ruling as a capitulation of the ICC to American pressure.[16] The

15. Karim Khan, 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, INT'L CRIM. CT. (Sept. 17, 2021). However, Khan also stated that "[i]n relation to those aspects of the investigation that have not been prioritised, my Office will remain alive to its evidence preservation responsibilities, to the extent they arise, and promote accountability efforts . . . ." *Id.* It remains to be seen what this will look like in practice and if perpetrators of deprioritized crimes will be held accountable.

16. *See, e.g.*, *ICC Rejects Request to Investigate War Crimes in Afghanistan*, BBC (Apr. 12, 2019), https://www.bbc.com/news/world-asia-47912140 [https://perma.cc/9HS2-U45T] [hereinafter *ICC Rejects Request*] ("Amnesty's Biraj Patnaik said the decision would be seen as a 'craven capitulation to Washington's bullying.'"); Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis*, 20 MELBOURNE J. OF INT'L L. 401, 402 ("[The decision was] widely interpreted as involving a capitulation to United States pressure [who opposed the investigation] given the express reference to the low likelihood of state cooperation and the 'changes within the relevant political landscape.'" (citing Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 24 (Apr. 12, 2019)); Mark Kersten, *The ICC was Wrong to Deny Prosecution Request for Afghan Probe,* AL JAZEERA (Apr. 12, 2019), https://www.aljazeera.com/opinions/2019/4/12/the-icc-was-wrong-to-deny-prosecution-request-for-afghan-probe/ [https://perma.cc/6W49-DDX7] ("No one believes that American officials will end up at the ICC. The assumption is that the ICC will wilt before American power. Many will see today's decision as the judges proving them right."); Nada Kiswanson, *Limits to Prosecutorial Discretion: The ICC Prosecutor's Deprioritisation Decision in Afghanistan,* OPINIO JURIS (Nov. 26, 2021), https://opiniojuris.org/2021/11/26/limits-to-prosecutorial-discretion-the-icc-prosecutors-deprioritisation-decision-in-afghanistan [https://perma.cc/FW3G-GVJJ] ("Viewed as, amongst other things, an expression of selective justice and impunity for the most powerful, the Deprioritisation Decision has been criticised by civil society and legal commentators alike . . . ."); *Afghanistan: ICC Prosecutor's Statement on Afghanistan Jeopardizes His Office's Legitimacy and Future*, AMNESTY INT'L (Oct. 25, 2021), https://www.amnesty.org/en/documents/ior53/4842/2021/en/ [https://perma.cc/VK55-J4ZA] [hereinafter *Afghanistan: ICC Prosecutor's Statement on Afghanistan*] ("In his stated approach, Prosecutor Khan appears willing to bow to political as well as resource pressure, applied by powerful states, whose actions would restrict the activities of a 'universal' ICC

Afghanistan investigation is not the first time the ICC and the Office of the Prosecutor (OTP) have either struggled with or avoided altogether prosecuting powerful individuals, including the political elite and citizens from powerful States.[17] When the ICC was created, it was "[d]etermined to put an end to impunity for the perpetrators of … crimes," including "unimaginable atrocities that deeply shock the conscience of humanity."[18] However, it has thus far been unsuccessful in its mandate, particularly when it comes to addressing the impunity of the powerful. Prosecutor Khan's announcement regarding Afghanistan is just one of many concessions the ICC has made to the powerful and is a sign of things to come. After the September announcement, Prosecutor Khan stated that the OTP would prioritize cases "with a likely chance of conviction and drop those where successful prosecution is unlikely."[19]

One challenge to Prosecutor Khan's stated prosecutorial strategy is the 2022 Russian invasion of Ukraine. Similar to the lack of accountability the United States faced for its war crimes in Afghanistan, Russia was able to annex the Ukrainian province of Crimea in 2014 with impunity[20] and was empowered to launch a full-scale invasion of Ukraine in 2022.[21] In addition to Russia's illegal

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which may investigate situations where their nationals and interests are affected.").

17. When this Note uses the term "the powerful," this describes both the political elite and individuals from powerful States that oppose the ICC, such as the United States.

18. Rome Statute of the International Criminal Court, Preamble, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

19. *ICC Prosecutor Defends Dropping US From Afghan War Crime Probe*, AL JAZEERA (Dec. 6, 2021), https://www.aljazeera.com/news/2021/12/6/icc-prosecutor-defends-dropping-us-from-afghan-investigation. [https://perma.cc/MMZ3-7EVU] [hereinafter *ICC Prosecutor Defends Dropping Probe*].

20. *See* John Simpson, *Russia's Crimea Plan Detailed, Secret and Successful*, BBC (Mar. 19, 2014), https://www.bbc.com/news/world-europe-26644082 [https://perma.cc/NU7G-Y3UA] ("The annexation of Crimea was the smoothest invasion of modern times. It was over before the outside world realised it had even started.").

21. Yuras Karmanau et al., *Russia Invades Ukraine on Multiple Fronts in 'Brutal Act of War'*, PBS (Feb. 24, 2022), https://www.pbs.org/newshour/world/russia-invades-ukraine-on-multiple-fronts-in-brutal-act-of-war [https://perma.cc/D8KE-EW5V] ("Russia launched a full-scale invasion of Ukraine on Thursday, unleashing airstrikes on cities and military bases and sending in troops and tanks

aggression toward and invasion of Ukraine, Russian soldiers have committed mass human rights violations against Ukrainian civilians, including rape, torture, and summary executions.[22] Although many in the international community have called attention to the growing evidence of Russia's war crimes,[23] the likelihood that anyone is successfully held accountable by the ICC is very slim, given that Russia is not a party to the Rome Statute and has no obligation to cooperate with the ICC. Moreover, as a permanent member of the United Nations Security Council (UNSC) with veto power, Russia enjoys additional protections against actions from the international community, including the ICC.[24] If Prosecutor Khan continues to prioritize a "winnable case" strategy as he did in Afghanistan, it is likely that powerful Russian individuals, such as Vladimir Putin, will be able to escape accountability for their atrocities.

If the ICC wants to fulfill its mandate of addressing and ending egregious human rights violations, it cannot ignore the crimes of the powerful, such as those committed by Americans and Russians. Instead, the ICC must prioritize these crimes in their investigations and prosecutions, despite the immense challenges in doing so. This

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from three sides in an attack that could rewrite the global post-Cold War security order.").

22. *See Ukraine: Apparent War Crimes in Russia-Controlled Areas: Summary Executions, Other Grave Abuses by Russian Forces*, HUM. RTS. WATCH (Apr. 3, 2022), https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas# [https://perma.cc/UN3V-E5FN] (summarizing documented war crimes committed by the Russian army thus far in Ukraine).

23. *See* Nandita Bose, *Biden Urges Putin War Crimes Trial After Bucha Killings*, REUTERS (Apr. 4, 2022), https://www.reuters.com/world/biden-says-putin-is-war-criminal-calls-war-crimes-trial-2022-04-04/ [https://perma.cc/EFL3-2SQK] ("U.S. President Joe Biden on Monday accused Russian President Vladimir Putin of war crimes and called for a trial, adding to the global outcry over civilian killings in the Ukrainian town of Bucha as more graphic images of their deaths emerged.").

24. The UNSC can take a variety of actions during mass human rights atrocities, such as referring case to the ICC, but since Russia is a permanent member of the UNSC and has veto power, Russia will veto any attempt by the UNSC to hold it accountable for its actions. *See* Edith M. Lederer & Jennifer Peltz, *Russia Vetoes UN Demand That Russia Stop Attacking Ukraine*, ABC NEWS (Feb. 25, 2022), https://abcnews.go.com/US/wireStory/russia-vetoes-demand-russia-stop-attacking-ukraine [https://perma.cc/4ES7-ND3C] ("Russia has vetoed a U.N. Security Council resolution demanding that Moscow immediately stop its attack on Ukraine and withdraw all troops, a defeat the United States and its supporters knew was inevitable but sought to highlight Russia's global isolation.").

Note will argue that Prosecutor Khan's prosecutorial strategy is not strategically advantageous for the ICC in the long run. Instead, the OTP needs to use its prosecutorial discretion to prioritize crimes committed by the powerful, including the political elite and nationals of powerful States. Although it is improbable that the ICC will be able to execute arrest warrants and sentences against these individuals, there is a normative value in addressing the impunity of these individuals despite the immense difficulties. To aid the OTP in this endeavor, the ICC should expand its use of *in absentia* trials,[25] particularly against nationals from States that refuse to cooperate with the ICC. *In absentia* trials can be a tool to hold powerful individuals responsible for their actions, strengthen civil society, and spark social movements.

Part I of this Note will discuss the development of international criminal law and the background of the ICC, including its formation, jurisdiction, purpose, and mission. Additionally, Part I will summarize the role of prosecutorial discretion in case selection at the ICC and the challenges the OTP has faced when attempting to address the crimes of the powerful. Moreover, Part I will discuss the history of the Russell Tribunal as an example of how *in absentia* trials have been used to address egregious human rights violations in the past. Part II of this Note will address the harms of a prosecutorial strategy that only focuses on cases "with a likely chance of conviction and drop[s] those where successful prosecution is unlikely."[26] Finally, Part III will discuss the value of *in absentia* trials and how the ICC can expand their use as a means to overcome the barriers addressed in Part I and address the impunity of the powerful.

I. Background of International Criminal Law

To understand the current challenges the ICC faces, it is valuable to trace the history of international criminal law.[27] The ICC

25. *In absentia* trials refer to "a trial where the accused is absent or, in other words, is not present. The standard to determine the presence or the absence of the accused is his physical presence in the courtroom during a trial." Mohammad Hadi Zakerhossein & Anne-Marie de Brouwer, *Diverse Approaches to Total and Partial* in Absentia *Trials by International Criminal Tribunals,* 26 CRIM. L. F. 181, 183 (2015).

26. *ICC Prosecutor Defends Dropping Probe*, *supra* note 19.

27. *Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 1955 (2001). Treaties and customary international law are two sources of international law found in Article 37 of the International Court of Justice (ICJ)

is the most recent development of a line of tribunals established to hold individuals accountable for human rights violations. Section I.A will trace the history of international criminal law from the Nuremberg Trials to the ICC. Section I.B will describe the formation and structure of the ICC, and Section I.C will discuss the role of prosecutorial discretion at the ICC and current critiques of the OTP's prosecutorial strategy. Lastly, Section I.D will address the challenges the OTP and ICC have faced throughout their short history.

A. History of International Criminal Law

Although the Rome Statute of the International Criminal Court established the first permanent international criminal court, it was not the first instance in which States coordinated agreements to address the most heinous of human rights violations. After World War II, the Allied Powers established the Nuremberg Tribunal, which was an attempt to establish a judicial process to hold Nazi leaders responsible for their war crimes and crimes against humanity conducted throughout World War II and the Holocaust.[28] Nuremberg was the first tribunal to investigate war crimes and crimes against humanity.[29] Although some critique Nuremberg as simply being "victor's justice,"[30] Nuremberg catalyzed the development of international criminal law as a field. Several norms from Nuremberg remain today, including the concept that any individual, no matter how powerful, should be held accountable for human rights

Charter. Article 37 of the ICJ Charter is known for listing the primary sources of international law; *see also* Christopher Greenwood, *Sources of International Law: An Introduction,* UNITED NATIONS (2008), https://legal.un.org/avl/pdf/ls/Greenwood_outline.pdf [https://perma.cc/9M8U-DDJ6].

28. Christopher Hale, Does the Evolution of International Criminal Law End With the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law, 35 DENVER J. INT'L L. & POL'Y 429, 442 (2007).

29. *Id.* at 442; *see also* Laurie A. Cohen, *Application of the Realist and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia*, 2 UCLA J. INT'L L. & FOREIGN AFF. 113, 143 (1997) ("The international court established to adjudicate at Nuremberg marked the creation of the first such tribunal to evaluate war crimes and crimes against humanity.").

30. Bishnu Pathak, *Nuremberg Tribunal: A Precedent for Victor's Justice*, TRANSCEND MEDIA SERV. (Sept. 21, 2020), https://www.transcend.org/tms/2020/09/nuremberg-tribunal-a-precedent-for-victors-justice/ [https://perma.cc/Y63Y-JN9K].

violations.[31] The next major developments in international criminal law occurred in the 1990s with the development of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in response to mass human rights violations in the former Yugoslavia and Rwanda.[32] Although these tribunals had many positive effects—including the chipping away of impunity and the further development of international criminal jurisprudence[33]—several weaknesses undermined their impact.

Like the ICC, both the ICTY and the ICTR suffered from a lack of state cooperation and legitimacy issues. Legitimacy, broadly defined, is acting with "justified authority,"[34] although other scholars have further defined the term as "the perception among relevant audiences that [a court's] actions are worthy of respect."[35] This type of legitimacy is conditioned on "whether such audiences perceive the Court—primarily the prosecutor . . . as selecting appropriate crimes and defendants for prosecution."[36] There are two particular cases that highlight the challenges and criticisms of the ICTR and ICTY. The first is the case of Jean-Bosco Barayagwiza at the ICTR. Barayagwiza was charged with multiple crimes, including genocide and crimes

31. Hale, *supra* note 28, at 442.

32. *Id.* at 445–56. The U.N. established these ad-hoc tribunals in the wake of the Rwandan Genocide and the Yugoslav Wars to hold the perpetrators of mass atrocities accountable. The tribunals were created after a UNSC resolution. *See The Genocide*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, https://unictr.irmct.org/en/genocide [https://perma.cc/7H3V-SLKX] (describing the human rights committed during the Rwandan Genocide); *The Conflicts*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, https://www.icty.org/en/about/what-former-yugoslavia/conflicts [https://perma.cc/VPN6-T9BZ] (describing the human rights violations committed during the Yugoslavian Conflict).

33. Hale, *supra* note 28, at 456–57.

34. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 601 (1999); *see also* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 530–531 (2003) ("By legitimacy, I mean justification for the exercise of authority.").

35. Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 268 (2012); *see also* Birju Kotecha, *The International Criminal Court's Selectivity and Procedural Justice*, J. INT'L CRIM. JUST. 107, 108 (2020) ("[T]he Court's perceived legitimacy [is] a particular audience's acceptance of its authority.").

36. deGuzman, *supra* note 35, at 268.

against humanity, but due to pretrial irregularities and a lengthy pretrial detention, Barayagwiza argued that his case should be dropped, and the ICTR Appeals Chamber agreed.[37] This decision infuriated the Rwandan government, and, afterward, they refused to cooperate with the ICTR and took steps to undermine its functioning, including banning the Prosecutor from entering her office in Rwanda and preventing sixteen witnesses from appearing in a different trial.[38] After political pressure from Rwanda, the ICTR Appeals Chamber reversed their decision, casting doubt regarding the ICTR's political autonomy.[39] The *Barayzgwiza* case highlights both international tribunals' reliance on State cooperation and the difficulties that arise when States withdraw their cooperation.[40]

Similarly, the ICTY faced criticism after not investigating the North Atlantic Treaty Organization (NATO)[41] coalition for its involvement in Kosovo. After NATO bombed Kosovo in Operation Allied Force, a group of law professors brought a complaint against American and Western European political and military leaders, alleging that NATO's use of cluster bombs in Kosovo constituted war crimes.[42] However, the prosecutor decided not to proceed with an investigation, even though NATO forces used similar weaponry as Serbian nationals charged with violations of international law.[43]

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37. Danner, *supra* note 34, at 530–31.

38. Cedric Ryngaert, *State Cooperation With the International Criminal Tribunal for Rwanda*, 13 INT'L CRIM. L. REV. 125, 131 (2013).

39. *Id.* at 132 (citing VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 184 (2008)) (noting that among many ICTR staff members, doubts emerged about the autonomy of the tribunal from Rwandan pressure).

40. Danner, *supra* note 34, at 531.

41. NATO is an alliance of 30 Western States, including France, Germany, the United Kingdom, and the United States. *NATO Member Countries*, NATO (Aug. 31, 2020), https://www.nato.int/cps/en/natohq/nato_countries.htm [https://perma.cc/7ESD-FUQ5].

42. Jonathan Hafetz, *Fairness, Legitimacy, and Selection Decisions in International Criminal Law*, 50 VAND. J. TRANSNAT'L L. 1133, 1139 (citing Andreas Laursen, *NATO, the War Over Kosovo, and the ICTY Investigation*, 17 AM. U. INT'L L. REV. 765, 770–72 (2003)).

43. *See* Final Rep. to the Prosecutor, Comm. Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Int'l Crim. Tribunal for the former Yugoslavia, 35 (June 8, 2000), reprinted in 39 I.LM. 1257 (2000) ("[T]he committee recommends that no investigation be commenced by the OTP in relation to the NATO bombing campaign or incidents occurring during the campaign.").

Critics accused the ICTY of bias towards NATO in its application of international law, thus challenging the impartiality of the tribunal.[44]

Although there were many issues with the ICTY and ICTR, their presence helped convince many in the international community of both the need for and viability of a permanent international criminal court.[45] With this goal in mind, many governments, intergovernmental agencies, and non-profits came together and, after many negotiations, the ICC was formed through the Rome Statute in 1998. The court became fully functioning in 2002.[46]

B. Formation and Structure of the ICC

On July 17, 1998, 120 States adopted the Rome Statute, the founding treaty of the ICC.[47] The Assembly of States Parties ("the Assembly")[48] established the ICC as the world's first permanent international criminal court that would have the authority to hear cases regarding the most egregious of human rights violations and hold individuals responsible for these violations.[49] The Assembly created this court with the goal of ending impunity for the most flagrant human rights violations, to prevent these crimes from occurring in the future, to provide a voice to victims, and to improve overall respect for international law.[50] The structure of the ICC,

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44. *See, e.g.*, Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503, 503–06 (2001); Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons To Be Learned from It*, 25 FORD INT'L L. J. 95, 99 (2001); Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT'L L. 85, 136–37 (2000).

45. Hale, *supra* note 28, at 463.

46. *Id.*; Amy McKenna, *The International Criminal Court (ICC)*, ENCYC. BRITANNICA, https://www.britannica.com/story/the-international-criminal-court-icc [https://perma.cc/4SWV-N5YC].

47. *Joining the International Criminal Court: Why Does it Matter?*, INT'L CRIM. CT., https://www.icc-cpi.int/Publications/Joining-Rome-Statute-Matters.pdf [https://perma.cc/6YTV-9UHC].

48. The Assembly of State Parties are the States that have signed and ratified the Rome Statute. The Assembly has several responsibilities, including "providing management oversight to the Presidency, the Prosecutor and the Registrar regarding administration of the Court [and] . . . adopt[ing] the Rules of Procedure and Evidence and the Elements of Crime." *Assembly of State Parties*, INT'L CRIM. CT., https://www.icc-cpi.int/asp [https://perma.cc/VV56-NP5N].

49. Rome Statute, *supra* note 18, art. 5, at 92.

50. Rome Statute, *supra* note 18, pmbl., at 91.

including its jurisdiction, admissibility requirements, and referral processes, plays a significant role in what cases are actually heard by the ICC. The ICC has subject-matter jurisdiction over four categories of crimes: genocide,[51] crimes against humanity,[52] war crimes,[53] and the crime of aggression.[54] As for personal jurisdiction, the ICC only

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51. Article 6 of the Rome Statute defines genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Rome Statute, *supra* note 18, art. 6, at 93.

52. Article 7 of the Rome Statute defines crimes against humanity as:

> [A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack; (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute, *supra* note 18, art. 7, at 93.

53. Article 8 defines war crimes as breaches of the Geneva Conventions, the Hague Conventions, Common Article 3 of the Geneva Conventions, and "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law." Rome Statute, *supra* note 18, art. 8, at 94–98.

54. Aggression was not included in the original Rome Statute but was, instead, added as an amendment after the Kampala Conference in 2010. The amendment to the Rome Statute defines aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which . . . constitutes a manifest violation of the Charter of the United Nations"

has authority over individuals in four categories: citizens of state parties; individuals who commit crimes on the territory of state parties; non-party states that consent to placing their citizens under the jurisdiction of the ICC; and individuals committing crimes that have been referred to the ICC by the UNSC.[55]

The ability of the ICC to exercise jurisdiction over non-party state citizens is controversial. Many scholars, lawyers, and governments, including the United States, have argued that the ICC does not have the authority to assert jurisdiction over citizens of non-party states, since third parties cannot be bound by treaties of other states,[56] and that state parties to the Rome Statute have no right under international law to delegate their territorial jurisdiction to an outside entity without the consent of the other state whose citizen it impacts.[57]

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and includes acts in which States threaten the territory and sovereignty of other states. Amendments to the Rome Statute of the International Criminal Court, art. 8 *bis*, C.N.651.2010 (entered into force June 11, 2010). The State Parties selected these four crimes because they "were the crimes arising from customary international law as codified in four main treaties: (1) the Genocide Convention, (2) the Geneva Conventions and Protocols, (3) the Hague Conventions of 1899 and 1907, and (4) the Nuremberg Charter." M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, 43 VA. J. INT'L L. 405, 434 (2003).

55. Rome Statute, *supra* note 18, art. 12(2) and art. 13(b), at 99. Contrast this to the principle of universal jurisdiction, which "[a]llows the national authorities of any state to investigate and prosecute people for serious international crimes even if they were committed in another country . . . [u]niversal jurisdiction is based on the notion that some crimes . . . affect the fundamental interests of the [whole] international community . . . ." *Factsheet: Universal Jurisdiction*, CNTR. CONST. RTS. (Dec. 7, 2015), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-universal-jurisdiction [https://perma.cc/9U4V-UCTU].

56. *See* Dr. Jay Alan Sekulow & Robert Weston Ash, *The Issue of ICC Jurisdiction Over Nationals of Non-Consenting, Non-Party States to the 16: Refuting Professor Dapo Akande's Arguments*, 16 S.C.J. INT'L L. & BUS. 1, 19 (2020) (explaining how "pursuant to customary international law, the ICC has no legal right or authority to investigate and/or to try any U.S. national for alleged commission in any place of any of the crimes listed in the Rome Statute," because the United States has not signed and ratified the treaty, and that through Article 34 of the Vienna Convention on the Law of Treaties, "[a] treaty does not create either obligations or rights for a third State without its consent").

57. *See* Madeline Morris, *The Jurisdiction of the International Criminal Court Over Nationals of Non-Party States*, 6 ILSA J. INT'L & COMP. L. 363, 366 (1999) (arguing that it is not customary international law for states to be able to

However, other scholars and the ICC itself have pushed back against these arguments against the legitimacy of asserting jurisdiction over non-party state citizens by showing that "under traditional rules of international law—nationals of a foreign State are normally subject to the laws of the State w[h]ere they are travelling,"[58] and "there is no logical reason why such States should be barred, by the Rome Statute, from cooperating to punish conduct which each of them had a clear right to punish individually."[59] Additionally, one scholar argues that the Rome Statute does not violate international legal principles because "there is no provision in the ICC Statute that requires non-party states (as distinct from their nationals) to perform or to refrain from performing any actions. The Statute does not impose any obligations on or create any duties for non-party states."[60]

Although this contention is still under debate, for the purposes of this Note, the ICC is assumed to have the legitimate authority to exercise jurisdiction over nationals of States that are not parties to the Rome Statute. The arguments that third-party states cannot be bound are not enough to refute the absolute sovereignty of states to assert jurisdiction over crimes committed in their territories, the ability to choose to delegate a portion of that sovereignty to an international tribunal, and the lack of obligations that the Rome Statute imposes on third-party states.

There are three ways in which the ICC can receive cases. The first is when a state party member refers a case to the OTP.[61] The second is when the UNSC refers a case to the ICC.[62] The third is for

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delegate their territorial jurisdiction to an international court without the consent of the other state whose citizen committed a crime).

58. Joseph M. Isanga, *The International Criminal Court Ten Years Later: Appraisal and Prospects*, 21 CARDOZO INT'L COMP. POL'Y & ETHICS L. 235, 295 (2013).

59. *Id.* at 296; *see also* Dapo Akande, *The Jurisdiction of the International Criminal Court Over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 621 (2003) ("[There is] evidence of extensive practice of states delegating part of their criminal jurisdiction over non-nationals either to other states or to tribunals created by international agreements, in circumstances in which no attempt is made to obtain the consent of the state of nationality.")

60. Akande, *supra* note 45, at 620.

61. Rome Statute, *supra* note 18, art. 13(a), at 99.

62. *Id.* art. 13(b), at 99. The UNSC can refer a case when acting under Chapter VII of the UN Charter. *Id.* That chapter describes the UNSC's responsibility to "maintain or restore international peace and security" in certain

the OTP to initiate investigations *proprio motu* based on information it receives from various sources.[63] For the Prosecutor to initiate an investigation *proprio motu*, they must submit a request to the Pre-Trial Chamber which evaluates whether the request meets admissibility guidelines.[64] If the Pre-Trial Chamber rejects the Prosecutor's request for an investigation, such as in the Situation in the Islamic Republic of Afghanistan,[65] the Prosecutor can appeal the decision to the Appeals Chamber.[66]

Regardless of the method of the referral, all cases are evaluated on their admissibility. First, the ICC is a court of complementarity,[67] meaning that the ICC will not look into a case or situation unless the State responsible for investigating the case is unable or unwilling to carry out the investigations.[68] The ICC is a court of last resort, with states charged with investigating the majority of crimes that fall within the ICC's jurisdiction.[69] Moreover, a case must be of sufficient "gravity" to be admissible.[70] Although gravity is not defined in the Rome Statute, the Pre-Trial Chamber

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situations. The power of Chapter VII, and thus of the UNSC, to refer to the ICC is not limited to UN member states. *See* U.N. Charter, art. 39.

63. Rome Statute, *supra* note 18, art. 13(c), at 99. *Proprio motu* means "on one's own initiative."

64. *Id.* art. 15(3)–(4), at 99.

65. Situation in the Islamic Republic of Afghanistan, *supra* note 16, at 32.

66. Rome Statute, *supra* note 18, art. 82, at 137.

67. *Id.* art. 1, at 91–92.

68. *Id.* art. 17, at 100. To determine whether a State is unable to investigate a case, the Court considers "[w]hether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." *Id.* art. 17(3), at 101. Factors the court look at to determine whether a State is unwilling to investigate a case include whether or not a State uses proceedings to shield their citizen from national accountability, an unjustified delay in proceedings that signal the State is not interested in bringing the person to justice, and the independence of the courts that held the proceedings. *Id.* art. 17(2), at 101. The ICC uses the complementary system both to respect state sovereignty and promote efficiency, since it would be impossible for the ICC to address every crime that falls within their jurisdiction. *See What Is Complementarity? National Courts, the ICC, and the Struggle Against Impunity*, INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/sites/default/files/subsites/complementarity-icc/ [https://perma.cc/Y7LU-ZBPA] (defining complementarity at the ICC and its benefits).

69. *What Is Complementarity? National Courts, the ICC, and the Struggle Against Impunity*, *supra* note 68.

70. Rome Statute, *supra* note 18, art. 17(1)(d), at 101.

stated that for a case to satisfy the gravity threshold, "the relevant conduct must be either systematic or large-scale, . . . due consideration must be given to the 'social alarm' such conduct may have caused in the international community[,] . . . [and] the perpetrator of the relevant conduct must be among the most senior leaders suspected of being the most responsible . . . ."[71] Moreover, the OTP has stated that to assess the gravity of the crimes, it considers (1) the scale of the crimes; (2) the nature of the crimes; (3) the manner of commission of the crimes; and (4) the impact of the crimes.[72] If a case lacks sufficient gravity, the case would be dismissed as being inadmissible.[73]

If a case that falls within the subject-matter and territorial jurisdiction of the court meets the admissibility requirements, the ICC has the authority to hear it.[74] However, even with these limits on what cases can get to the ICC, it would still be impossible for the Prosecutor to investigate all the instances of crime that fall within the ICC's jurisdiction, given the high volume of cases and limited resources.[75] Therefore, the OTP uses its wide grant of prosecutorial discretion to choose which cases to prioritize.

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71. Susana SáCouto & Katherine Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. U. INT'L L. REV. 807, 811 (2008) (citing Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-tEN-Corr, 65 (Pre-Trial Chamber 1, 17 January 2006)).

72. *Draft Policy Paper on Preliminary Examinations,* OFF. OF THE PROSECUTOR [OTP], ICC, 13 (2010), https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf [https://perma.cc/H3RZ-RLM3].

73. Rome Statute, *supra* note 18, art. 17(1)(d), at 101. For example, the Prosecutor declined to investigate alleged British war crimes in Iraq due to a "lack of gravity." *See* Lovisa Bådagård & Mark Klamberg, *The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court*, 48 GEO. J. INT'L L. 639, 713 (2017) ("The OTP has twice declined to open investigations due to insufficient gravity. The first time was in 2006, in response to Article 15 communications alleging crimes committed by British troops in Iraq."). The definition of "gravity" is still highly contentious given the term's vagueness. Critics argue that it is nearly impossible to be objective because gravity is an ambiguous term, and there is little agreement amongst the Court, the Prosecutors, and supporters of the Court on how to sufficiently define gravity and "even less about which crimes are the most deserving of ICC resources." deGuzman, *supra* note 35, at 269.

74. *See* Rome Statute, *supra* note 18, art. 5–19, at 92–103 (describing the requirements for the ICC to have the authority to hear a case).

75. Hafetz, *supra* note 42, at 1152.

C. Role of Prosecutorial Discretion

Similar to prosecutors in American criminal law, the OTP has broad discretion over questions such as which investigations to prioritize, whether to charge an individual, whether to drop charges in an ongoing case, and whether to agree to administratively close or terminate a case.[76] The Assembly's broad grant of discretion to the Prosecutor is particularly evident in its creation of the Prosecutor's *proprio motu* powers.[77] This power of prosecutorial discretion is only subject to judicial review by either the ICC Pre-Trial Chamber or the Appeals Chamber.[78] In addition to helping the OTP handle its high case load, another motivation behind granting this discretion was to create an "autonomous actor on the international scene" not influenced by international politics, since the Rome Statute forbids the Prosecutor to act on the instructions of outside entities.[79]

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76. *See What Is Prosecutorial Discretion?*, FINDLAW (Nov. 12, 2019), https://www.findlaw.com/criminal/criminal-procedure/what-is-prosecutorial-discretion-.html [https://perma.cc/V27S-KZ4X] (describing prosecutorial discretion in the United States, including a prosecutor's prerogative to prioritize cases, bring charges, drop charges, and agree to administratively close or terminate a case).

77. *See* Brian Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 554 (2010) ("The Rome Statute gives the Prosecutor wide discretion over the launching of investigations into situations that could involve crimes within the Court's jurisdiction as well as in the bringing of cases against particular suspects.").

78. Isanga, *supra* note 58, at 262. This aspect of the Prosecutor's authority has been a source of contention; particularly, some express concern that the Rome Statute gives the Prosecutor the authority to pursue politically motivated cases. However, the ICC argues that the Rome Statute "subjects the Prosecutor's conclusion that a reasonable basis to proceed *proprio motu* with an investigation exists to the review of the Pre-Trial Chamber at a very early stage of the proceedings." Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶18 (Mar. 31, 2010).

79. Luis Moreno-Ocampo, Prosecutor of the Int'l Crim. Ct., *Building a Future on Peace and Justice*, Address at Nuremburg, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf [https://perma.cc/4BQX-KHNB]; *see also* Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT'L L. 215, 219 (2008); Rome Statute, *supra* note 18, art. 42(1), at 113 ("The Office of the Prosecutor shall act independently as a separate organ of the Court. . . . A member of the Office shall not seek or act on instructions from any external source.").

Given the broad discretion granted to the OTP, the OTP has developed a list of strategic goals to help guide its prosecutorial strategy. These goals include achieving a high success rate in court, fast and effective preliminary examinations, investigations and prosecutions, increasing State cooperation, and closing the impunity gap.[80] Additionally, the OTP states that it prioritizes cases based on the overarching principles of independence,[81] impartiality,[82] and objectivity.[83] Although the OTP tries to formulate a consistent case selection process, these goals do not offer much help, given that most of the cases that the ICC encounters could fit these criteria.[84] The vagueness of the criteria, among other factors, has raised questions as to what other factors contribute to the OTP's case selection, such as political considerations.[85]

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80. *Strategic Objectives*, INT'L CRIM. CT., https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx [https://perma.cc/WUU4-AU3T]. "Impunity gap" can be defined as the lack of accountability for individuals who commit egregious human rights violations, despite the vast number of these types of crimes that are committed. *See Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction*, AMNESTY INT'L (Oct. 2009), https://www.amnesty.org/en/wp-content/uploads/2021/07/ior530052009en.pdf [https://perma.cc/7YHK-YC52] ("In the past few decades, millions of Africans have been the victims of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances. However . . . [o]nly a few states where the crimes occurred or whose nationals have committed crimes abroad have brought any of those responsible to justice.").

81. The OTP defines independence as the principle "that decisions shall not be influenced or altered by the presumed or known wishes of any external actor." OFFICE OF THE PROSECUTOR, ICC, *Policy Paper on Case Selection and Prioritization* 7 (Sept. 16, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [https://perma.cc/GUS2-7FC3].

82. The OTP defines impartiality as the principle "that the Office will apply consistent methods and criteria irrespective of the States or parties involved or the person(s) or group(s) concerned." *Id.* at 8.

83. The OTP defines objectivity as the principle "the Office will select and pursue cases only if the information and evidence available or accessible to the Prosecution, including upon investigation, can reasonably justify the selection of a case." *Id.*

84. *See, e.g.*, Situation in the Islamic Republic of Afghanistan, *supra* note 16; *Situation in Georgia*, ICC, https://www.icc-cpi.int/georgia [https://perma.cc/3TF5-2VSP]; *Preliminary Examination: Ukraine*, ICC, https://www.icc-cpi.int/ukraine [https://perma.cc/6SSM-XZC8].

85. For example, although many States, including the United States, were worried that a Prosecutor with a wide range of discretion would lead to politically motivated prosecutions, these concerns have not come to fruition, since the ICC

The OTP's prioritization of cases has been a contentious issue since the beginning of the ICC. Many criticize the ICC for having an almost exclusive focus on African nations.[86] One scholar noted "a growing perception that Africans have become the sacrificial lambs in the ICC's struggle for global legitimation."[87] Even within Africa, the OTP tends to prioritize prosecuting rebel leaders over government officials, even when the government also faced accusations of war crimes.[88]

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has "largely sought to accommodate the concerns of major powers, including the United States." Hafetz, *supra* note 42, at 1142.

86. Isanga, *supra* note 58, at 262 ("For some critics, the fact that the ICC Prosecutor focused almost exclusively on African situations vindicates their suspicions that his office is susceptible to politicization, particularly aimed at the promotion of Western interests, as some have suggested."); *African Union Backs Mass Withdrawal From ICC*, BBC NEWS (Feb. 1, 2017), https://www.bbc.com/news/world-africa-38826073 [https://perma.cc/LF52-HKQM] ("The African Union has called for the mass withdrawal of member states from the International Criminal Court . . . South Africa and Burundi have already decided to withdraw, accusing the ICC of . . . unfairly targeting Africans."); Adam Taylor, *Why So Many African Leaders Hate the International Criminal Court*, THE WASH. POST (June 15, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court [https://perma.cc/7WJ2-GEGS] ("'The court has transformed itself into a political instrument targeting Africa and Africans,' Tedros Adhanom Ghebreyesus, the Ethiopian foreign minister, said at an A.U. summit in 2013."); *Id.* ("'The most horrific mass atrocities in recent years have taken place outside of Africa, and the ICC simply is not there,' said Leslie Vinjamuri, director of the Center for the International Politics of Conflict, Rights and Justice (CCRJ) at the University of London's School of Oriental and African Studies."). As of October 2021, all 46 defendants that have been tried at the ICC have been African nationals. *List of Defendants,* INT'L CRIM. CT., https://www.icc-cpi.int/Pages/defendants-wip.aspx# [https://perma.cc/UKS7-39UY]. *But see* Franck Kuwonu, *ICC: Beyond the Threats of Withdrawal African Countries in Dilemma Over Whether To Leave or Support the International Criminal Court*, U.N, AFRICAN RENEWAL (May – July 2017), https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal [https://perma.cc/5ULH-RWKZ] (showing that many cases ongoing at the ICC were referred by African nations themselves).

87. Charles Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 462-65 (2009), cited in deGuzman, *supra* note 35, 269–70 (2012).

88. For example, in the Situation in Uganda, the Ugandan government used the ICC prosecution aid in their conflict against the Lord's Resistance Army while also ensuring the ICC did not investigate any of their own government or military forces. All the arrest warrants from Uganda were issued for senior LRA commanders. Hafetz, *supra* note 42, at 1151. There have been several cases against government officials, including heads of State (Al-Bashir from Sudan and

Others criticize the OTP's general refusal to pursue nationals from powerful States. For example, its unwillingness to investigate alleged British war crimes in Iraq due to a "lack of gravity"[89] brought condemnation from human rights practitioners and NGOs.[90] Similarly, Prosecutor Khan recently decided to deprioritize American war crimes in Afghanistan.[91] The OTP's avoidance of prosecuting individuals from powerful Western states has led some to argue that the "ICC's docket contributes to a perception of universal justice as 'universal in name only.'"[92] However, when evaluating these critiques, it is vital to consider the immense obstacles the OTP faces and the difficulties the OTP has experienced when attempting to investigate and prosecute powerful individuals, such as those from powerful States or political elites.

D. Challenges Facing the OTP in its Case Selection

The OTP faces incredible difficulty in prosecuting nationals from powerful nations and individuals with political clout. When the OTP has sought to investigate and prosecute powerful individuals, it has encountered several challenges, including intense political pressure and undermining and a lack of cooperation from both state parties and non-state parties to the Rome Statute. The cases of Omar Al-Bashir, Uhuru Kenyatta, and the United States' relationship with the ICC highlight these difficulties.

The ICC indicted Omar Al-Bashir—the former sitting president of Sudan—for crimes he committed in Darfur, including

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Kenyatta from Kenya for example), but these cases have been largely unsuccessful. *Id.*

89. William Schabas*, Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 742–43 (2008) (questioning the ICC prosecutor's decision not to investigate crimes of British soldiers in Iraq); Press Release, ICC Watch, Why Won't the ICC Move Against Tony Blair on War Crimes? (Feb. 4, 2010), http://www.iccwatch.org/pdf/Press%20Release%2004Feb10.pdf [https://perma.cc/J8SS-3GWW] (discussing failure of the ICC to investigate alleged war crimes of British leaders and soldiers) [hereinafter Why Won't the ICC Move Against Tony Blair].

90. Schabas*, supra* note 89, at 742–43 (questioning the ICC prosecutor's decision not to investigate crimes of British soldiers in Iraq); Why Won't the ICC Move Against Tony Blair, *supra* note 89 (discussing failure of the ICC to investigate alleged war crimes of British leaders and soldiers).

91. Khan, *supra* note 15.

92. Hafetz, *supra* note 42, at 1146.

genocide, war crimes, and crimes against humanity.[93] The African Union was very unhappy with Al-Bashir's indictment.[94] One controversial aspect of the Rome Statute and the ICC is that there are no immunities for sitting heads of state, thus allowing individuals like Al-Bashir to be indicted for crimes.[95] Many nations in the African Union have argued that this provision violates customary international law[96] and have thus wanted the ICC to drop the case.[97] Because of Al-Bashir's indictment and general frustrations regarding the OTP's case selection, several African nations have threatened to withdraw from the Rome Statute; Burundi became the first nation to leave in 2017.[98] Other states defiantly opposed the ICC by refusing to

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93. *Situation in Darfur, Sudan*, INT'L CRIM. CT., https://www.icc-cpi.int/darfur [https://perma.cc/7BLM-6NXG].

94. *Al-Bashir's Escape: Why the African Union Defies the ICC*, THE CONVERSATION (June 15, 2015 9.29 AM EDT), https://theconversation.com/al-bashirs-escape-why-the-african-union-defies-the-icc-43226 [https://perma.cc/GCU8-8DYZ]; Tim Murithi, *Africa Relations With the ICC: A Need for Reorientation?*, PERSPECTIVES—POL. ANALYSIS & COMMENT. FROM AFR., Aug. 6, 2012, at 6; *see also* Max Du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes*, 235 INST. SEC STUDIES. 1, 8 (2012) (citing late former Malawian President Bingu wa Mutharika)

> To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years . . . there is a general concern in Africa that the issuance of a warrant of arrest for . . . al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union Charter.

Id.

95. *See* Rome Statute, *supra* note 18, art. 27(2) ("[I]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.").

96. "Customary international law refers to international obligations arising from established international practices . . . . Customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation." *Customary International Law,* CORNELL L. SCH., https://www.law.cornell.edu/wex/customary_international_law [https://perma.cc/DAS5-WAJC].

97. *Al-Bashir's Escape: Why the African Union Defies the ICC*, *supra* note 94.

98. *Why Does the International Criminal Court not Have More Support?*, THE ECONOMIST (Apr. 21, 2021), https://www.economist.com/the-economist-explains/2021/04/21/why-does-the-international-criminal-court-not-have-more-support [https://add perma.cc/RA2Q-QKPJ]; *Burundi Leaves International Criminal Court Amid Row*, BCC (Oct. 27, 2017), https://www.bbc.com/news/world-

execute Al-Bashir's active arrest warrant. Al-Bashir was allowed to travel freely in and out of various African nations, including Kenya, Nigeria, and South Africa for over ten years,[99] even though the Rome Statute obligates State parties to execute arrest warrants.[100]

An additional example is the case of Uhuru Kenyatta. Kenyatta was allegedly involved in post-election violence in Kenya that took place in 2007–2008.[101] He was charged with five counts of crimes against humanity.[102] The ICC had to drop the charges, however, because the OTP was not able to secure enough evidence to convict Kenyatta.[103] According to the OTP, the Kenyan government withheld key evidence[104] despite the fact that Kenya is a party to the Rome Statute,[105] causing the OTP to fail to meet its burden.

The Al-Bashir and Kenyatta cases highlight the ICC's general struggle to secure State cooperation from State parties to the Rome Statute, limiting their ability to conduct investigations and prosecutions successfully. Under Article 86 of the Rome Statute, "State Parties shall . . . cooperate fully with the Court in its

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africa-41775951 [https://perma.cc/QX86-CABQ]. South Africa and The Gambia also temporarily withdrew, although both countries ultimately withdrew their decisions. Cara Anna, *UN: South Africa's ICC Withdrawal Revoked After Court Ruling*, ASSOCIATED PRESS (Mar. 8, 2017), https://news.yahoo.com/un-south-africas-icc-withdrawal-revoked-court-ruling-081608670.html?fr=sycsrp_catchall [https://perma.cc/D9VN-DRHZ].

99. *See* Emmanuel Igunza, *African Union Backs Mass Withdrawal From ICC*, BBC (Feb. 1, 2017), https://www.bbc.com/news/world-africa-38826073 [https://perma.cc/MN4A-YPT6] ("The [South African] government later announced that it was withdrawing from the ICC because it did not want to execute arrest warrants which would lead to 'regime change.'"); Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. TIMES (June 15, 2015), https://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html (on file with the *Columbia Human Rights Law Review*) (showing that Al-Bashir was allowed to travel freely to and from Nigeria, Kenya, and South Africa).

100. Rome Statute, *supra* note 18, arts. 59(1), 86.

101. *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, BBC (Dec. 5, 2014), https://www.bbc.com/news/world-africa-30347019 [https://perma.cc/7YVV-2ETB].

102. *Kenyatta Case*, INT'L CRIM. CT., https://www.icc-cpi.int/kenya/kenyatta [https://perma.cc/X9JB-25XF].

103. *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, supra note 101.

104. *Id.*

105. The Rome Statute requires State parties to hand over evidence to the OTP. Rome Statute, *supra* note 18, arts. 86, 93.

investigation and prosecution of crimes within the jurisdiction of the Court."[106] When State parties fail in their duty to cooperate with the ICC, "the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."[107] In practice, however, neither the Assembly of State Parties nor the UNSC have responded to acts of non-compliance by State parties, further undermining the ICC's goal of securing State cooperation.[108]

In addition to lack of compliance by State parties, the ICC has also generally not been able to secure cooperation from non-party states. Because the ICC is a treaty-based court, non-party states have no legal obligation to cooperate with the ICC even if their citizens are under investigation, unless the state was referred to the ICC by the UNSC.[109] Three out of the five permanent members of the UNSC are not party to the Rome Statute and therefore have no obligation to

106. Rome Statute, *supra* note 18, art. 86. Types of cooperation include the surrendering of arrest and surrender of individuals with arrest warrants, gathering of evidence, protecting victims and witnesses, seizing proceeds, property, assets, and instrumentalities of crimes, and producing documents for trial. *Id.*, art. 89–93. Because the State parties have acceded to the Rome Statute, under international law they are obligated to cooperate with the ICC because of the international legal principle *pacta sunt servanda* ("agreements must be kept."). Prosecutor v. Taylor, SCSL-2003-01-1 (3014–3039), Decision on Immunity from Jurisdiction, Special Court for Sierra Leone, ¶ 57 (May 31, 2004), http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf [https://perma.cc/D9QT-3FLM].

107. Rome Statute, *supra* note 18, art. 87(7).

108. Aaron Moss, *Asset Preservation, State Cooperation and the International Criminal Court*, 22 MELB. J. INT'L L. 57, 60 (2021). The refusal of African States to arrest Omar Al-Bashir is the epitome of the issue of lack of State party compliance. *See* Konstantinos Magliveras & Gino Naldi, *The ICC Addresses Non-Cooperation By States Parties: The* Malawi *Decision,* 6 AFR. J. LEGAL STUD. 137, 137–138 (2013).

109. Vienna Convention on the Law of Treaties art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. States have the obligation to cooperate with UNSC requests because the UNSC has the authority to take measures to maintain peace and security under Chapter VII of the UN Charter, and virtually all States are members of the U.N. *See* U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."); U.N. Charter art. 43, ¶ 1 ("All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council . . . armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.").

cooperate with the ICC.[110] This creates issues for the OTP, particularly in cases in which the OTP wants to investigate nationals of permanent members of the UNSC, such as the United States, Russia, and China.

Unlike State parties, the United States, for instance, does not have any legal obligation to grant the ICC access to its territory or citizens, execute arrest warrants, seize assets of alleged perpetrators, or gather evidence for trials against their citizens. Because the United States is a permanent UNSC member, it also has veto power to reject any UNSC resolution that would require its compliance with the ICC.[111] The lack of cooperation from both state parties and non-state parties creates major barriers for the OTP in completing successful investigations, prosecutions, and enforcement of judgments, which further creates issues of legitimacy.

Moreover, powerful nations such as the United States have used their political clout not only to refuse to cooperate, but to actively undermine the ICC's attempts to fulfill its mandate. During the Bush Administration, the United States used its veto power in the UNSC to block a U.N. peacekeeping mission in Bosnia, "essentially holding the Bosnia mission hostage until it convinced the Security Council to pass a resolution limiting the ICC's power to prosecute U.S. peacekeepers."[112] Further, the Bush Administration attempted to undermine the ICC by signing bilateral treaties with 100 nations limiting the extradition of U.S. citizens to the ICC.[113]

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110. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [https://perma.cc/3XAU-K4L7].

111. The UNSC veto power comes from Article 27 of the U.N. Charter. *See* U.N. Charter art. 27, ¶¶ 1, 3 ("Each member of the Security Council shall have one vote . . . [d]ecisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members . . . ."). Russia has used this veto power to block the UNSC's condemnation of their illegal annexation of Crimea. Somini Sengupta, *Russia Vetoes U.N. Resolution on Crimea*, N.Y. TIMES (Mar. 15, 2014), https://www.nytimes.com/2014/03/16/world/europe/russia-vetoes-un-resolution-on-crimea.html (on file with the *Columbia Human Rights Law Review*).

112. Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 687–688 (2003).

113. CLARE RIBANDO SEELKE, CONG. RSCH. SERV., RL33337, ARTICLE 98 AGREEMENTS AND SANCTIONS ON U.S. FOREIGN AID TO LATIN AMERICA 1, 2 (Mar. 22, 2007), https://crsreports.congress.gov/product/pdf/RL/RL33337 [https://perma.cc/2EF2-YK4G]. The United States threatened other States with sanctions if they did not agree to the treaties. *Id.* at 1. Critics argue that these

Although the Obama administration was less hostile towards the Court, relations again became contentious between the Trump administration and the ICC.[114] Tensions between the ICC and the United States arose when former Prosecutor Bensouda requested to open an investigation into war crimes committed in Afghanistan, including those carried out by the United States military.[115] In retaliation, the Trump administration revoked Prosecutor Bensouda's visa and threatened to issue economic sanctions against the ICC if it continued its investigation.[116]

When the ICC does not have the cooperation of states, it lacks the capabilities to perform its functions and execute its judgments.[117] Although state parties have an obligation to comply with ICC orders, there are no repercussions for not doing so given that the ICC "has no power to compel state compliance with its requests and . . . is unable to directly sanction states for lack of compliance."[118] A lack of state cooperation directly led to Al-Bashir roaming free for ten years with an active arrest warrant[119] and Kenyatta's case being dropped due to a lack of evidence.[120] Moreover, there have been instances where trials have stalled because of a lack of state cooperation. Similar to Al-Bashir's case, Abdallah Banda Abakaer Nourain was indicted for

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agreements violate Article 18 of the Vienna Convention on the Law of Treaties, which forbids States to act in ways that "defeat the object and purpose of a treaty." *See* Vienna Convention on the Law of Treaties art. I, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 336 (entered into force Jan. 27, 1980) ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . [i]t has expressed its consent to be bound by the treaty."); HUM. RTS. WATCH, BILATERAL IMMUNITY AGREEMENTS (June 20, 2003), https://www.hrw.org/sites/default/files/related_material/2003.06_US_Bilateral_Immunity_Agreements.pdf [https://perma.cc/PD4H-UJNA] (arguing that US bilateral agreements violate the "spirit and the letter of the ICC Treaty").

114. Ochs, *supra* note 14, at 89.

115. *Id.*

116. Judith Kelley, *The U.S. Revoked the Visa for the ICC Prosecutor. That Bodes Poorly for International Criminal Justice.*, WASH. POST (Apr. 8, 2019), https://www.washingtonpost.com/politics/2019/04/08/us-revoked-visa-icc-prosecutor-that-bodespoorly-international-criminal-justice/?utm_term=.c04ad3fd666c (on file with the Columbia Human Rights Law Review).

117. Nadia Banteka, *Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem*, 49 CORNELL INT'L L.J. 521, 528 (Fall 2016).

118. *Id.*

119. Onishi, *supra* note 99.

120. BBC, *supra* note 101.

war crimes for his involvement in Darfur, Sudan.[121] Although Banda appeared voluntarily to the ICC for his trial, he subsequently failed to appear, and Sudan refused to cooperate to bring Banda back to the ICC.[122] The trial had to stop because the Rome Statute does not allow *in absentia* trials,[123] with a few exceptions.[124]

The lack of an enforcement mechanism severely hampers the efforts of the OTP to "achieve a high rate of success at court, increase the speed, efficiency, and effectiveness of preliminary examinations, investigations and prosecutions, and close the impunity gap."[125] Given these immense difficulties, the OTP and the ICC as a whole have started to avoid prosecuting individuals when there is a lack of state cooperation or great resistance by states.[126] In a 2016 policy paper, the OTP stated it would prioritize cases for which it can "conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction,"[127] in addition to cases in which there is a high level of "international cooperation and

121. *Banda Case*, ICC, https://www.icc-cpi.int/darfur/banda [https://perma.cc/5ZW3-FTVF].

122. Paul Bradfield, *In Absentia Trials at the ICC? The Banda Case Re-Awakens*, BEYOND THE HAGUE (May 15, 2020), https://beyondthehague.com/2020/05/15/in-absentia-trials-at-the-icc-the-banda-case-re-awakens/ [https://perma.cc/ME3A-U7UQ].

123. *See* Rome Statute, art. 63(6), *supra* note 18, at 31 ("The accused shall be present during the trial.").

124. The Assembly of State parties made exceptions to the prohibition of *in absentia* trials that allowed temporary absences for individuals with "extraordinary public duties." *See* RULES OF PROCEDURE AND EVIDENCE, ICC 53 (2019), https://www.icc-cpi.int/resource-library/documents/rulesproceduree vidence eng.pdf ("An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only . . . ."). The Assembly of State Parties voted for the exceptions after difficulties with the Ruto and Kenyatta case. Alexander Schwarz, *The Legacy of the* Kenyatta *Case: Trials* in Absentia *at the International Criminal Court and Their Compatibility With Human Rights*, 16 AFR. HUM. RTS L.J. 99, 100 (2016).

125. ICC, *supra* note 80.

126. *See ICC Prosecutor Defends Dropping Probe*, *supra* note 19 ("[Prosecutor Khan] added that the 'time for change is ripe' at the ICC in general, reiterating earlier promises to focus on cases with a likely chance of conviction and drop those where successful prosecution is unlikely.").

127. OFFICE OF THE PROSECUTOR [OTP], POLICY PAPER ON CASE SELECTION AND PRIORITIZATION 16 (Sept. 16, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [https://perma.cc/8UVQ-LBKZ].

judicial assistance to support the Office's activities."[128] The Pre-Trial Chamber rejected Prosecutor Fatou Bensouda's request to investigate U.S. crimes committed in Afghanistan because it seemed "doomed to fail" due to a lack of state cooperation and other extenuating circumstances.[129] Prosecutor Khan, the most recently elected Prosecutor of the ICC, affirmed that in the future, his office would prioritize cases "with a likely chance of conviction and drop those where successful prosecution is unlikely."[130]

Given the challenges the ICC faces, it is understandable that the OTP has elected to pursue a prosecutorial strategy that prioritizes cases it believes it can win—primarily cases in which there is state cooperation. With increased state cooperation, the OTP would be better able to secure evidence, execute arrest warrants, increase the rate of success in court, and improve the speed, efficiency, and effectiveness of preliminary examinations, investigations, and prosecutions. Some argue that increased speed and success in court could help close the impunity gap, since the ICC would be able to hear more cases and convict more individuals.[131]

Other scholars have agreed with Prosecutor Khan and have argued that the "OTP should prioritize situations and cases with a higher probability of success, thereby demonstrating a higher degree of effectiveness and viability"[132] and that "the OTP directing its attention and limited resources elsewhere [away from "unwinnable" cases] may be more beneficial to objectives that build on the actual completion of trials, such as ending impunity, providing redress for victims, and preventing crimes."[133] Moreover, others have argued that "unenforced indictments can serve to highlight the court's lack of enforcement power and, potentially, to diminish its ultimate preventive and deterrent effect"[134] such that "[s]enior government and non-state leaders in a position to prevent major crimes may conclude that the ICC's indictments are unlikely to threaten them and therefore choose not to modify their behavior,"[135] resulting in

128. *Id.* at 17.
129. Situation in the Islamic Republic of Afghanistan, *supra* note 16, at 29.
130. *ICC Prosecutor Defends Dropping Probe*, *supra* note 19.
131. Bådagård & Klamberg, *supra* note 73, at 706.
132. *Id.*
133. *Id.* at 707.
134. David Bosco, *The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?*, 19 MICH. ST. U. COLL. L. J. INT'L L. 163, 193 (2011).
135. *Id.*

continued impunity. Despite the preventative goals served by this argument, judges in the ICC have not adopted this view with consistency and have pushed for avoidance of weaker cases in an effort to preserve resources and encourage successful and efficient completion of trials.[136]

The challenges that the ICC faces in addressing the impunity of the powerful are not a recent phenomenon. They have been present since the beginning of international criminal law. The question then becomes: are the critics and current ICC Prosecutor correct that it is better for the longevity of the ICC to ignore the crimes of the powerful and prioritize "winnable" cases? This Note argues that although this type of prosecutorial strategy is plausible, it is not the correct one. Although it seems improbable at the moment that the ICC could ever end the impunity of the most powerful, there is hope if one looks at examples of how impunity for egregious human rights violations has been addressed previously, through institutions such as the Russell Tribunal.

E. The Russell Tribunal

Trials, even if they are conducted *in absentia* with little chance of criminal enforcement, can still have significant effects on addressing the impunity of the powerful. One example is the Russell Tribunal, also known as the International War Crimes Tribunal.[137] The Russell Tribunal was an unofficial war crimes tribunal established by philosopher Bertrand Russell to investigate alleged United States crimes in Vietnam.[138] It formed in response to American atrocities committed in Vietnam, and it provides an interesting case study on how to address impunity of egregious human rights violations when there is a lack of state acknowledgement or response. Even though the Tribunal was critiqued for being "partisan, procedurally flawed, and

136. David Scheffer, *A Pragmatic Approach to Jurisdictional and Definitional Requirements for the Crime of Aggression in the Rome Statute*, 41 CASE W. RES. J. INT'L L. 397 (2009).

137. Marcos Zunino, *Subversive Justice: The Russell Vietnam War Crimes Tribunal and Transitional Justice*, 10 INT'L J. TRANSITIONAL JUST. 211, 211 (Apr. 1, 2016).

138. *Id.*

illegitimate,"[139] it still sparked social movements that pressured the Johnson administration to ultimately end its involvement in the Vietnam War.[140] If an unofficial tribunal can influence a major world power's decision, then an official trial at the ICC, even if *in absentia*, could also be a powerful tool for addressing impunity. This Part will discuss the history of the Russell Tribunal, its strengths and weaknesses, and how the OTP can similarly "affect the moral foundations upon which actors around the world make decisions"[141] by seeking prosecutions against individuals from powerful States, even if it is highly unlikely that these individuals would ever find themselves in the custody of the ICC.

The Russell Tribunal, created by Bertrand Russell and Jean-Paul Sartre in 1967, was an attempt to hold the United States accountable for the crimes it committed in Vietnam.[142] Russell modeled the Tribunal after the Nuremberg trials, but because there was not any state support or international backing, it lacked the ability to enforce its verdicts.[143] Although it was an unofficial institution, the Tribunal wanted to be as legitimate as possible. In the interest of fairness, the Tribunal invited all parties to present evidence; this included the United States government, although it did not participate.[144] Moreover, the Tribunal started its sessions with a statement setting the rules of procedure. "[They pledged to] examine all the evidence that may be placed before it by any source or party,"[145] and also stated that "no evidence relevant to the purposes of the Tribunal will be refused attention" and "no witness competent to testify about the events with which the inquiry is concerned will be

139. Gabrielle Simm & Andrew Byrnes, *International Peoples' Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?*, 4 ASIAN J. INT'L. L. 103, 105 (2014).

140. Cody J. Foster, *Did America Commit War Crimes in Vietnam?*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/opinion/did-america-commit-war-crimes-in-vietnam.html [https://perma.cc/7XET-2PGS].

141. Margaret M. deGuzman & Timothy Lockwood Kelly, *The International Criminal Court is Legitimate Enough to Deserve Support*, 33 TEMP. INT'L & COMPAR. L.J. 397, 404 (2019).

142. Simm & Byrnes, *supra* note 140, at 104.

143. Zunino, *supra* note 138, at 213.

144. *Id.* at 214, 218. In response, Secretary Dean Rusk responded that "he had no intention of 'playing games with a 94-year-old Briton.'" *Id.* at 214–15.

145. International War Crimes Tribunal, *Statement of the President of Sessions*, *in* AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 52 (John Duffett ed., 1968).

denied a hearing."[146] The Tribunal still had access to a wide array of evidence regarding the actions of the United States in Vietnam, despite the lack of cooperation from the United States itself.

Throughout the trial, the Tribunal "heard evidence from journalists, experts, eyewitnesses (including civilians injured during the war and three U.S. soldiers who admitted to participating in torture), and its own investigative team [was] sent to Vietnam to verify claims of the destruction of civilian targets."[147] The Tribunal heard both personal and expert testimony regarding the various violations of international human rights[148] and humanitarian law[149] committed by the United States in Vietnam and the surrounding areas, including torture, sexual assault, acts of aggression, genocide, and other war crimes.[150] The Tribunal evaluated testimony in light of

146. *Id.*

147. Fleming Terrell, *Unofficial Accountability: A Proposal for the Permanent Women's Tribunal on Sexual Violence in Armed Conflict*, 15 TEX. J. WOMEN & L. 107, 116 (2005).

148. *See International Human Rights Law: Training Module*, USCIS (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/foia/International_Human_Rights_Law_RAIO_Lesson_Plan.pdf [https://perma.cc/YP8K-K7FW] ("International human rights law refers to the body of international law designed to promote and protect human rights at the international, regional and domestic levels.").

149. *See What is International Humanitarian Law?*, ICRC ADVISORY SERV. ON INT'L HUMANITARIAN L. (July 2004), https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf [https://perma.cc/XXY5-KE7N] ("International humanitarian law is a set of rules which seek, for humanitarian reasons, *to limit the effects of armed conflict*. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.").

150. *See* Foster, *supra* note 141 ("[American interrogators] tortur[ed] civilians for information . . . . [A]dditional interrogators and Vietnamese people confirmed that they had been waterboarded, shocked and burned. A few even shared how they were sexually assaulted through the insertion of snakes and sticks into their bodies."); *Id.* ("Tribunal members were equally worried about the military's use of advanced weaponry in areas populated by civilians. One particular bomb gave them pause because its design seemed intent only on inflicting mass casualties."); Zunino, *supra* note 138, at 215 (describing the Russell Tribunal finding that the US inflicted hostile practices against Laos, "that it had used prohibited weapons and that it had subjected prisoners of war to unlawful treatment under the laws of war. Most notably, it found the US guilty of genocide against the people of Vietnam."); *Id.* ("The verdict rendered [by the Tribunal] on 10 May 1967 found that the US had committed acts of aggression against Vietnam, that it was guilty of deliberate bombardment of civilian targets and that it had violated the sovereignty of Cambodia."); Tor Krever, *Remembering the Russell Tribunal*, 5 LONDON REV. INT'L L. 483, 487 (2018) ("There are the

various international legal instruments, including the Geneva Conventions and their Additional Protocols, the Kellogg-Briand Pact, the Hague Conventions of 1899 and 1907, and the Charter of the United Nations.[151] After the trial, the Tribunal found that the United States had indeed violated international law, but because the Tribunal did not have the authority to enforce its verdicts, it "limited its judgment to whether and by whom a crime falling within the jurisdiction of the WWII-era Nuremberg Tribunal had been committed and what punishment would have been applicable had the Nuremberg Tribunal adjudicated the matter."[152] Although the Tribunal could not officially hold any State or individual accountable for their actions, they found that they had accomplished what they set out to do, since "[t]he purpose of the exercise was . . . to raise awareness about the illegality of U.S. actions in Vietnam . . . [and] to encourage, rather than replace, official mechanisms of accountability."[153]

Many at the time harshly criticized the Tribunal, calling it a "'kangaroo court' or a 'circus.'"[154] There were several issues that impacted its institutional legitimacy. First, the members of the Tribunal were not legal experts, but instead were "internationally recognized academics, scientists, lawyers, former heads of state and peace activists" applying international law to issue legal judgments.[155] One critic noted that the Tribunal "flew in the face of legalism, undermining the three dikes that hold the deep social waters away from the preserve of the law: the Tribunal usurped legal language and institutions, openly violated legal principles and featured laypersons ministering to the law."[156] Others criticized the Tribunal because "its legal conclusions were predetermined, and therefore amounted to foregone conclusions . . . . [I]ts outcome was

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reports from members of the Tribunal's fact-finding missions to North Vietnam, first-hand accounts of the ravages of napalm—'his ears just melted'—and evidence of deliberate targeting of civilians . . . hospitals, schools, churches bombed, far removed from any military target.").

151. Terrell, *supra* note 148, at 116.

152. *Id.*

153. *Id.*

154. Richard Falk, *War, War Crimes, Power, and Justice: Toward a Jurisprudence of Conscience*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 667, 682 (2013).

155. Foster, *supra* note 141.

156. Zunino, *supra* note 138, at 221.

accurately anticipated in advance,"[157] given that all members of the Tribunal were open critics of the Vietnam War.[158]

In spite of these issues, the Tribunal was successful in "call[ing] attention to massive crimes and dangerous criminals who would otherwise enjoy a free pass and produced a generally reliable and comprehensive narrative account of criminal patterns of wrongdoing and flagrant violations of international law that destroyed and disrupted the lives of entire societies and millions of people."[159] In addition to drawing attention to crimes being committed in Vietnam, the Tribunal had other accomplishments, such as spurring the global anti-war movement.[160] After the findings were released, organizers coordinated peaceful protests worldwide, including in the United States, Western Europe, Central and South America, and throughout Asia.[161] The findings and subsequent protests also energized ongoing efforts to challenge other American wrongdoings, including racial oppression, imperialism, and colonialism.[162] Although the Tribunal and protests did not cause the United States to immediately withdraw from Vietnam, they did contribute to the pressure felt by the Johnson administration to end the war.[163] Additionally, the success of the Russell Tribunal began a series of other citizens tribunals that addressed other human rights

157. Falk, *supra* note 155, at 682.
158. Zunino, *supra* note 138, at 221.
159. Falk, *supra* note 155, at 682.
160. Foster, *supra* note 141.
161. *Id.*
162. *Id.*
163. *Id.* ("If only for a moment, the tribunal's findings helped invigorate the global antiwar movement to increase pressure on the Johnson administration to bring the Vietnam War to a close."); *see also* Sean Raming, *We Shall Not Alter It Much By Our Words: The Media and the 1967 International War Crimes Tribunal*, HUMANS. AND SOC. SCIS. 1, 12 (2020), https://dumas.ccsd.cnrs.fr/dumas-02904655/document [https://perma.cc/T65P-5QS6] ("[A] series of subtle actions and congruent actors connected activist and activism from Northern Europe, to North Vietnam, and finally to North America. The Tribunal had an important yet unacknowledged scope of influence on the antiwar movement."); Krever, *supra* note 151, at 489 ("The Russell Tribunal placed the question of the war's legality squarely in the public eye with its insistence that the war was . . . morally reprehensible [and] *criminal*. Such association . . . was important in arousing opposition amongst [those] who were indifferent to the necessity . . . of the struggle against imperialism.").

violations, including crimes committed in Latin America, West Germany, Iraq, and Palestine.[164]

The Russell Tribunal is an example of how even flawed attempts to address impunity can impact a state's decision making by exposing violations of international law. Although the "legal" aspects of the trial were faulty, the Tribunal was still able to accomplish what it set out to do—"to raise awareness about the illegality of U.S. actions in Vietnam [and] 'bring about a general recognition of the need for an [official] *international institution* for which [the Russell Tribunal] has neither the means nor the ambition to be a substitute . . . .'"[165] The ICC is the international institution that Russell was looking for, but it is still struggling to fully achieve its mandate of ending the impunity of the most egregious of crimes.[166] If the OTP pursues a prosecutorial strategy that prioritizes cases it believes are "winnable," then the ICC will continue to struggle with fulfilling its mandate. The next Part will discuss the flaws in the OTP's proposed prosecutorial strategy prioritizing "winnable cases."

II. The Flaws of a Pursuing a "Winnable Case" Prosecutorial Strategy

Given the challenges discussed above, it is understandable that many scholars and the OTP believe prioritizing "winnable" cases will help close the impunity gap and increase respect for international criminal law. However, while this strategy would potentially result in short-term gains, it would be harmful to the ICC's goals in the long term. This Part will discuss the various flaws in a prosecutorial strategy that focuses on "winnable" cases.

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164. Krever, *supra* note 151, at 489.

165. Terrell, *supra* note 148, at 116 (emphasis added) (quoting Jean Paul Sartre, *Inaugural Statement*, *in* AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSEL INTERNATIONAL WAR CRIMES TRIBUNAL 43 (John Duffett ed., 1986)).

166. Ewelina U. Ochab, *As the International Criminal Court Faces More Challenges, We Need it More Than Ever*, FORBES (Sept. 13, 2020), https://www.forbes.com/sites/ewelinaochab/2020/09/13/as-the-international-criminal-court-faces-more-challengs-we-need-it-more-than-ever/?sh=244a5ae91468 [https://perma.cc/PB96-CYNE].

A. The ICC is Susceptible to Political Pressure

Avoiding the prosecution of the political elite and individuals from powerful states gives the appearance that the ICC is not truly an independent entity, but rather an institution that is susceptible to being unduly influenced by powerful outside actors. One scholar notes that "[t]he greatest threat . . . to the legitimacy of the permanent Court, would be the credible suggestion of political manipulation of the Office of the Prosecutor, or of the Court itself, for political expediency."[167] The initial decision of the Pre-Trial Chamber to deny Prosecutor Bensouda's investigation into American war crimes caused many to raise questions about the Court's legitimacy, particularly since some viewed it as bowing to American political pressure.[168]

Moreover, critics see Prosecutor Khan's decision to deprioritize United States war crimes in Afghanistan as further proof of this issue.[169] One commentator noted that "[i]f the

167. Louise Arbour, *The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR Y.B. ACCESS JUST. 207, 213 (1999).

168. *See ICC Rejects Request*, *supra* note 16 ("Amnesty's Biraj Patnaik said the decision would be seen as a 'craven capitulation to Washington's bullying.'"); Guilfoyle, *supra* note 16, at 402 ("[The decision] was widely interpreted as involving a capitulation to United States pressure [opposing the investigation] given the express reference to the low likelihood of state cooperation and the 'changes within the relevant political landscape.'"); Kersten, *supra* note 16 ("No one believes that American officials will end up at the ICC. The assumption is that the ICC will wilt before American power. Many will see today's decision as the judges proving them right.").

169. *See* Kiswanson, *supra* note 16 ("Viewed as, amongst other things, an expression of selective justice and impunity for the most powerful, the Deprioritisation Decision has been criticised by civil society and legal commentators alike."); *Afghanistan: ICC Prosecutor's Statement on Afghanistan*, *supra* note 16 ("In his stated approach, Prosecutor Khan appears willing to bow to political as well as resource pressure, applied by powerful states, whose actions would restrict the activities of a 'universal' ICC which may investigate situations where their nationals and interests are affected."); Julian Elderfield, *Uncertain Future for the ICC's Investigation Into the CIA Torture Program*, JUST SEC. (Nov. 12, 2021), https://www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/ [https://perma.cc/T32K-LWMQ] ("While the Prosecutor is entitled to exercise his discretion in the selection of cases, the few reasons offered publicly to deprioritize the CIA investigation do not stand up to scrutiny . . . the decision erodes the standing of the [OTP] as an independent and impartial body."); Press Release, Int'l Fed'n for Hum.Int'l Fed'n for Hum. Rts. & Center for Const. Rts.,Resumption of the ICC Investigation into

prosecutor . . . shutter[s] the US dimension of the Afghanistan situation, that sends a message that . . . bullying the ICC yields result[s]: former US officials and contractors will continue to enjoy impunity, and the message will be understood by other war criminals that the US playbook works."[170] Additionally, if the OTP yields to political pressure and only pursues "winnable" cases, the OTP would be forced to pursue individuals with less political clout, such as low-ranking soldiers, mid-level personnel, or rebel leaders. While some states may be more eager to assist in these situations, prioritizing cases that have a higher chance for success would be more harmful to the ICC's legitimacy in the long run. One scholar argues that:

> [I]t would be senseless for the ICC to select the easiest and cheapest cases to prosecute so that it could pursue a few more defendants out of the vast numbers of those deserving punishment in situations all over the world. A prosecutorial strategy that focused on easy-to-convict low-ranking soldiers and allowed leaders to go free would thus undermine the ICC's legitimacy with most relevant audiences and would certainly do so at the international level.[171]

Furthermore, if the ICC ignores the impunity of the powerful, not only does it empower "weaker" individuals to avoid repercussions for their actions by following the "playbook"[172] of the powerful, but it also allows the powerful to continue to commit egregious crimes.

B. When Impunity is Ignored, History Tends to Repeat Itself

A prosecutorial strategy that ignores the crimes of the powerful will contribute to a cycle of continued egregious violations of international law. A notable example is the actions of the United

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Afghanistan, While Welcome, Should Not Exclude Groups of Victims or Crimes Within the Court's Jurisdiction (Sept. 28, 2021), https://www.fidh.org/en/region/asia/afghanistan/resumption-of-the-icc-investigation-into-afghanistan-while-welcome [https://perma.cc/Q5P7-M2W6] ("for the process to be legitimate in the eyes of the Afghan population and justice stakeholders, an ICC investigation should look into crimes committed by all actors who have been involved in the past 20 years of conflict. This is key . . . to protect the mandate of the ICC.").

170. Gasia Ohanes, *ICC Under Fire for Seeking Afghanistan Probe Without US Focus*, DW (Sept. 29, 2021), https://www.dw.com/en/icc-under-fire-for-seeking-afghanistan-probe-without-us-focus/a-59325722 [https://perma.cc/5ZE3-XBR5].

171. deGuzman, *supra* note 35, at 303.

172. Ohanes, *supra* note 171.

States in the Middle East. In its Global War on Terror, the international community has allowed the United States to continually violate norms of international human rights and international humanitarian law, resulting in the deaths of a minimum of 22,679 and potentially up to 48,308 civilians throughout Iraq, Syria, Yemen, and Afghanistan.[173] Additionally, the United States set up centers for individuals to be regularly tortured, including Abu Ghraib in Iraq,[174] Bagram Airforce base in Afghanistan,[175] Guantanamo Bay,[176] and CIA black sites in Poland,[177] which is a *jus cogens* violation of international law.[178] There has been little in the way of accountability mechanisms for the United States' violations of international law, and therefore the United States has no reason to stop committing such violations. The OTP's choice to ignore these crimes not only denies justice to the victims, but encourages the United States and other powerful nations to continue to act with impunity.

C. Silences the Voices of Victims

Finally, by avoiding the investigation and prosecution of citizens from powerful States, the voices of those who are victims of

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173. Imogen Piper & Joe Dyke, *Tens of Thousands of Civilians Likely Killed by US in 'Forever Wars',* AIRWARS (Sept. 6, 2021), https://airwars.org/news-and-investigations/tens-of-thousands-of-civilians-likely-killed-by-us-in-forever-wars/ [https://perma.cc/DTX5-J8CD].

174. Rebecca Leung, *Abuse At Abu Ghraib*, CBS NEWS (May 5, 2004), https://www.cbsnews.com/news/abuse-at-abu-ghraib/ [https://perma.cc/U8Q4-SPKH].

175. Jennifer Fenton, *What Happened to Prisoners at Bagram, 'Afghanistan's Guantanamo'?*, AL JAZEERA (Feb. 11, 2019), https://www.aljazeera.com/features/2019/2/11/what-happened-to-prisoners-at-bagram-afghanistans-guantanamo [https://perma.cc/9YZ6-MVH3].

176. *Guantánamo Prisoner Details Torture for First Time: 'I thought I was going to Die'*, THE GUARDIAN (Oct. 29, 2021), https://www.theguardian.com/us-news/2021/oct/29/going-die-guantanamo-prisoner-torture-testimony [https://perma.cc/BJP2-6GTX].

177. Adam Goldman, *The Hidden History of the CIA's Prison in Poland*, THE WASH. POST (Jan. 23, 2014), https://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html [https://perma.cc/YEJ2-G3NW].

178. *Jus cogens* norms are certain international norms that cannot be violated in any circumstance, such as torture, genocide, and crimes against humanity. *Jus Cogens,* CORNELL L. SCH., https://www.law.cornell.edu/wex/jus_cogens [https://perma.cc/9AUB-EGVP].

crimes committed by powerful perpetrators are silenced. The ICC has a responsibility to act in a manner mindful of "victims of unimaginable atrocities that deeply shock the conscience of humanity,"[179] but countless individuals are left out when the OTP avoids prosecuting individuals from powerful states. Human Rights Watch summarized the issue well when considering the Pre-Trial Chambers decision to deny Prosecutor Bensouda's request to investigate American war crimes in Afghanistan:

> Decades of impunity in Afghanistan have made it clear to victims of grave crimes and their families that the interests of the powerful will almost always supersede their interests and their right to see those responsible held to account. By opting out of an investigation of the likely war crimes and crimes against humanity in Afghanistan, the judges have effectively told the victims that the ICC won't stand up for them either. And that's a dangerous message that will resonate well beyond Afghanistan.[180]

If the OTP wants to increase its legitimacy amongst affected communities, it cannot ignore the plight of victims from nationals from powerful States. As one commentator put it, "why should the victims in Darfur be ignored by the ICC because President al-Bashir has been successful in avoiding justice?"[181] Similarly, why should torture victims in Afghanistan be ignored by the ICC because it was United States' military personnel that was committing the torture?

If a prosecutorial strategy that prioritizes "winnable" cases is harmful in the long term for the ICC, then the question becomes: What should be done, given the extensive barriers in place for conducting successful investigations and trials against individuals from powerful nations and the political elite? To have long-term success, the ICC is going to have to find creative solutions to address the impunity of the powerful, and expanding the use of *in absentia* trials, such as the *in absentia* trial conducted in the Russell Tribunal, provides at least one creative solution.

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179. Rome Statute, *supra* note 18, at Preamble.

180. Param-Preet Singh, *In Afghanistan, the ICC Abandons the Field*, HUM. RTS. WATCH (Apr. 23, 2019), https://www.hrw.org/news/2019/04/23/afghanistan-icc-abandons-field [https://perma.cc/3F22-K7TY].

181. Bådagård & Klamberg, *supra* note 73, at 707.

III. The Solution: Expanding the Use of *In Absentia* Trials

Thus far, this Note has described the flaws with the OTP's prosecutorial strategy of prioritizing "winnable" cases. The question then becomes what alternatives are available. In this Part, this Note will present the expansion of *in absentia* trials as an alternative means for the ICC to address the impunity of the powerful. There are valid concerns with the fairness of *in absentia* trials, and in an ideal world, the ICC would have unlimited resources to investigate every crime that fell within its jurisdiction and states would cooperate with every ICC request. However, that is far from the current reality, and the ICC is unlikely to garner this type of support from states in the near future. Therefore, the ICC and the OTP must be creative in addressing these issues, and allowing *in absentia* trials, particularly for at-large individuals or individuals from powerful States who refuse to cooperate, is one solution. This Part will explore the normative benefits of *in absentia* trials and address the strengths and weaknesses of such an approach.

A. Normative Benefits of *In Absentia* Trials

There are several normative benefits if the ICC were to allow the use of *in absentia* trials as a tool to address the crimes of powerful individuals. First, by seeking justice against powerful individuals, the OTP would be "promot[ing] an uncompromising form of justice, setting a pedagogical example and challenging impunity even for the most powerful."[182] Although it may not currently be realistic for a former United States president or current Russian president to be held accountable for their crimes at the ICC, persistence in the face of difficulties would serve an important pedagogical function for future generations as international criminal law continues to develop.[183]

Moreover, the efforts to prosecute all individuals regardless of their nationality and status would serve an expressive function. The ICC's central purpose is to "express global norms, thus affecting the moral foundations upon which actors around the world make decisions."[184] Therefore, in the case selection process, OTP should focus the ICC's limited resources on articulating and expressing desired legal norms by prioritizing cases that illuminate these desired

182. *Id.* at 706.
183. *Id.* at 707.
184. deGuzman & Kelly, *supra* note 142, at 404.

global norms.[185] For example, the OTP could prioritize "particular offenses" in their case selection "such as attacks on peacekeepers, the use of child soldiers, or the destruction of cultural sites, to harness criminal law's potential to develop and entrench norms and values."[186] Prosecutor Bensouda's prioritization of more "historically under-prosecuted crimes, such as destruction of the environment, illegal exploitation of natural resources, and illegal dispossession of land, acknowledges the utility of illustrative prosecutions"[187] by establishing that the ICC would no longer turn a blind eye to these types of crimes. Similarly, if the current Prosecutor chose to prioritize the prosecution of individuals from powerful states, rather than avoiding them, he would be solidifying the global norm that no individual is above the law, no matter their nationality or status. This approach would "strengthen both the impact and legitimacy of prosecutorial choices,"[188] and the ICC as a whole.

A prosecutorial strategy that prioritizes the crimes of the powerful and solidifies the norm that no individual is above the law would also address the ICC's current issues of legitimacy. Scholars have posited various reasons for the ICC's current global legitimacy issue, including the ICC's almost exclusive focus on Africa in its case selection,[189] the general avoidance of political elites and individuals from powerful States in its prosecutions,[190] and the ICC's

185. deGuzman, *supra* note 35, at 269–270.

186. Hafetz, *supra* note 42, at 1164 (citing deGuzman, *supra* note 35, at 314).

187. *Id.* at 1164–65.

188. *Id.* at 1165.

189. *See* Isanga, *supra* note 58, at 262 ("For some critics, the fact that the ICC Prosecutor focused almost exclusively on African situations vindicates their suspicions that his office is susceptible to politicization, particularly aimed at the promotion of Western interests, as some have suggested.").

190. *See* Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, 171 WORLD AFFS. 23, 36 (2009) (highlighting the worry among Africans that the ICC "may be turning criminal prosecution into a selective political instrument"); Matthew Happold, *International Criminal Court and the Lord's Resistance Army*, 8 MELB. J. INT'L L. 159, 170–72 (2007) (describing the criticism the ICC received for focusing investigations and prosecutions on rebels, rather than both rebels and state actors, since both sides in the Ugandan conflict committed mass atrocities); William Schabas, *supra* note 89, at 742–43 (questioning the ICC prosecutor's decision not to investigate crimes of British soldiers in Iraq).

vulnerability to political pressure.[191] The legitimacy of an international tribunal "depends on their fairness, both objective and perceived,"[192] and many critiques that the OTP receives target its actual and perceived fairness in selecting cases. Although the OTP has stated that it will not select cases based on geopolitical implications or geographic balance,[193] it would be able to address its objective and perceived unfairness by "focusing more on distributive considerations in the selection of situations and cases"[194] to include citizens from powerful States that it has thus far generally ignored.

The global community would see the OTP as more legitimate if it picked cases more fairly. If the OTP is perceived to be more legitimate, it would be able to better secure state compliance, particularly states that are a party to the Rome Statute.[195] A prosecutorial strategy that focused on ending the impunity of the most powerful would help address the critiques that the ICC only targets Africans, avoids Western nationals, and is too susceptible to political interference. However, to utilize this type of prosecutorial strategy, the ICC must be creative in how it seeks cases against these individuals. One current barrier is that since the ICC does not have an enforcement mechanism for bringing individuals to trial, powerful individuals can stall the proceedings against them by simply not showing up to their court hearings,[196] as the Rome Statute mostly forbids *in absentia* trials.[197] Given the current lack of State compliance—and the lack of repercussions for refusing to abide by

191. *See ICC Rejects Request*, *supra* note 16 ("Amnesty's Biraj Patnaik said the decision [to deny an investigation into Afghanistan] would be seen as a 'craven capitulation to Washington's bullying.'"); *Afghanistan: ICC Prosecutor's Statement on Afghanistan*, *supra* note 16 ("In his stated approach, Prosecutor Khan appears willing to bow to political as well as resource pressure, applied by powerful states, whose actions would restrict the activities of a 'universal' ICC which may investigate situations where their nationals and interests are affected.").

192. Hafetz, *supra* note 42, at 1165.

193. Office of the Prosecutor [OTP], *Policy Paper on Preliminary Examinations*, ¶ 29 (Nov. 2013), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf [https://perma.cc/9USQ-8Z34].

194. Hafetz, *supra* note 42, at 1165.

195. Danner, *supra* note 34, at 534–535.

196. *See* INT'L CRIM. CT., *supra* note 110 (providing an example of a case being stalled at the ICC because the defendant did not reappear to court).

197. *See* Rome Statute, *supra* note 18, art. 63(1) ("The accused shall be present during the trial.").

ICC orders[198]—there is no guarantee that powerful individuals would ever be required to attend their trials. To address the crimes of the powerful, the ICC must allow and expand the use of *in absentia* trials, similar to the one seen in the Russell Tribunal. Although the Russell Tribunal had several issues, it still addressed American war crimes in Vietnam. If a legally illegitimate people's tribunal can have a considerable impact even with its shortcomings, a legitimate legal institution such as the ICC could replicate the results of the Russell Tribunal and meaningfully address the impunity of the powerful.

B. Replication of the Benefits of the Russell Tribunal at the ICC

If the ICC allowed *in absentia* trials, it would advance the goal of ending impunity for egregious human rights violations. Although the ICC may have difficulty achieving successful outcomes in the traditional sense by adopting this strategy—such as attaining successful arrest warrants and enforcing judgments—indictments against the powerful are not meaningless. Rather, legitimate and fair trials against powerful individuals strengthen local civil societies and increase pressure against world leaders to respect international law, as demonstrated by the Russell Tribunal.

While Al-Bashir's case highlights the ICC's current difficulties in enforcing its judgments, it also shows the value of empowering the local civil society. When it indicted Al-Bashir, the ICC indicted a head of state for the first time, signifying the first establishment of the norm that no one—including political elites—is above the law.[199] The ICC faced criticism for its rejection of the Head of State Immunity Doctrine,[200] and several State parties simply

198. *See* Moss, *supra* note 108, at 60 (highlighting the lack of repercussions of States not abiding by ICC orders).

199. Press Release, Int'l Crim. Ct., ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan (Mar. 4, 2009), https://www.icc-cpi.int/news/icc-issues-warrant-arrest-omar-al-bashir-president-sudan [https://perma.cc/DLE5-Q9UB].

200. *See* Leila Sadat, *Why the ICC's Judgment in the Aal-Bashir Case Wasn't So Surprising*, JUST SEC. (July 12, 2019), https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising [https://perma.cc/ZP8E-KAQL] (collecting criticisms levied against the ICC in the wake of its finding that "there is no Head of State immunity under customary international law vis-à-vis an international court").

ignored the ICC's orders to arrest Al-Bashir.[201] Although Al-Bashir evaded arrest for over ten years, in 2021, the Sudanese government announced its intention to hand Al-Bashir over to the ICC.[202] Accounting for the change in policy, Sudanese Prime Minister Abdalla Hamdok stated that "Sudan's commitment to seek justice is not only to abide by its international commitments, but it comes out of a *response to the people's demands*."[203] The Sudanese people had had enough of individuals escaping judgment simply because of their status. They pressured the current Sudanese government to hand Al-Bashir to the ICC to stand for trial. Although the Al-Bashir case is not an example of an *in absentia* trial, it does show the potential progress that can happen when local civil society is empowered. If the ICC expands its use of *in absentia* trials against non-cooperative world leaders and states, it is likely that, as the powerful face legitimate indictments of war crimes and crimes against humanity, local civil society will be empowered and large global social movements will be sparked.

If ICC indictments against the powerful sparked and empowered global social movements, it could pressure the international community to cooperate with the ICC. States comply "with international norms and rules when it is in line with their interests to do so."[204] Global social movements can pressure states to comply with the ICC in various ways. If a state's population pressures its leadership to cooperate with the ICC, state leaders may cooperate because they find domestic political benefits, such as the United States in the Vietnam War.[205] Global social movements, such as the anti-war movement sparked against the Vietnam War, could pressure the leadership of third states to take coercive action against non-compliant states to invoke compliance, such as travel bans or asset

201. *See* Igunza, *supra* note 99 (summarizing an African Union resolution to withdraw from the ICC, and instances where member states refused to arrest Al-Bashir); Norimitsu Onishi, *Omar Al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. TIMES (June 15, 2015), https://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html (on file with the *Columbia Human Rights Law Review*) (showing that Al-Bashir was allowed to travel freely to and from Nigeria, Kenya, and South Africa).

202. *Sudan Says Will 'Hand Over' Al-Bashir to ICC for War Crimes Trial*, AL JAZEERA (Aug. 12, 2021), https://www.aljazeera.com/news/2021/8/12/sudan-omar-al-bashir-icc-war-crimes-darfur [https://perma.cc/2R95-VXJ8].

203. *Id.* (emphasis added).

204. Banteka, *supra* note 118, at 537.

205. Foster, *supra* note 141.

freezes.[206] For example, in the Al-Bashir case, "third states diplomats sabotaged [Al-Bashir's] anticipated visits by canceling, rescheduling, or relocating meetings thus putting a detriment to his ability to engage effectively in multilateral diplomacy."[207] Moreover, during the ICTY, "[t]he UNSC has also urged states to individually impose asset freezes against individuals as well as nations that aided individuals indicted by international courts and tribunals, particularly the ICTY."[208] Coercive action more effectively compels non-compliant states when the state parties to the Rome Statute coordinate their sanctions to enforce compliance.

Even if global social movements do not lead to state action against non-compliant states, *in absentia* trials would create reputational damage for indicted individuals. Such reputational harm "may have a negative effect on the state's overall reputation, decreasing the willingness of other states to engage in cooperative or diplomatic relations with that state in general."[209] International lawyers and international relations theorists argue that the "reason why states keep commitments, even those that produce a lower level of returns than expected, is because they fear that any evidence of unreliability will damage their current cooperative relationships and lead other states to reduce their willingness to enter into future agreements."[210] Of course, "reputational consequences of a state's noncompliance with a given treaty are . . . limited by the history of its cooperative relationships with the other member states," and reputation may motivate states to different degrees.[211] Nevertheless, any reputational harm often goes against states' interests, which may induce compliance.[212] The Russell Tribunal and negative publicity of the My Lai massacre tarnished the United States' reputation abroad. This reputational damage played a role in pressuring the United States government to withdraw from Vietnam.[213] If a United States

206. *See* Banteka, *supra* note 118, at 537 ("In the instances where a state does not comply with its obligations due to contrary interests, the main way to enforce compliance under the realist lens is through coercive action by third states to achieve a shift of the interests of non-complying states towards compliance.").

207. *Id.* at 540–541.

208. *Id.* at 541.

209. *Id.* at 542.

210. George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law,* 31 J. LEGAL STUD. S95, S96 (2002).

211. *Id.* at S97.

212. Banteka, *supra* note 118, at 537.

213. Foster, *supra* note 141.

leader were to be indicted for war crimes for America's involvement in Afghanistan, it would likely increase international pressure for the United States to stop violating international norms as it conducts wars.

Admittingly, there are valid critiques against expanding the use of *in absentia* trials. Ideally, the ICC and OTP would have both the resources and necessary state compliance to hear every case that falls within its jurisdiction, and States would cooperate with the ICC to the best of their abilities. However, this is not the current reality and another solution needs to be found to address impunity. *In absentia* trials, although not perfect, are a legitimate way to hold powerful individuals accountable for their crimes. This next section addresses critiques to expanding the use of *in absentia* trials and argues that those critiques do not outweigh the benefits of expansion to the fight against impunity.

C. Critiques and Rebuttals of Expanding the Use of *In Absentia* Trials

Some critique the use of *in absentia* trials at the ICC because their use might decrease the perceived legitimacy of the ICC. Some may see this strategy as the ICC conceding that it cannot effectively execute arrest warrants and enforce judgments. Others critique *in absentia* trials by characterizing it similarly to the Russell Tribunal: as a legal "circus."[214] Although legal experts traditionally understand *in absentia* trials as largely impermissible,[215] some scholars argue that *in absentia* trials may be necessary to address impunity in international criminal law.[216] Throughout the history of international

214. Falk, *supra* note 155, at 682.

215. For example, many have interpreted Art. 14(3) of the ICCPR to generally forbid *in absentia* trials. *See* International Covenant on Civil and Political Rights art. 14(3)(d), *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171, 177 (entered into force Mar. 23, 1976) [hereinafter ICCPR] ("[E]veryone shall be entitled . . . [t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."); Beth Van Schaack, *Trials in Absentia Under International, Domestic and Lebanese Law*, JUST SEC. (Jan. 18, 2014), https://www.justsecurity.org/5839/trials-absentia/ [https://perma.cc/75QB-PL6R] (noting that the HRC has found the ICCPR generally forbids trials *in absentia*, albeit with narrow exceptions under article 14(3)(d)).

216. *See* Johanna Göhler, *Busy Defendants and Phantom Trials: Rethinking the Defendant's Attendance Requirement Before the ICC*, 19 NEW CRIM. L.R. 473, 476 (2016) ("the defendant has only a right to attend the trial, not an

criminal law, many tribunals allowed the use of *in absentia* trials, notably when defendants refused to cooperate with the court, including the Nuremberg Trials and the ICTY.[217] Additionally, modern-day specialized international criminal tribunals sparingly allow *in absentia* trials, such as the Special Court for Sierra Leone, Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon.[218] Ideally, international compliance would allow the ICC to compel the presence of anyone indicted by the court, but currently the powerful avoid prosecution by the ICC simply by not cooperating with the court. Increasing the use of *in absentia* trials at the ICC allows the court to hold individuals accountable to a limited extent when they commit egregious human rights violations.

Moreover, critics argue that expanding the use of *in absentia* trials at the ICC is unfair and does not guarantee due process protections for defendants. Other courts have found *in absentia* trials to have violated due process protections.[219] However, for many of these cases, a lack of sufficient notice violated the defendants' due process rights. In the case of the ICC, notice will arguably not be an issue, given the magnitude of the crimes committed by human rights violators and the widespread publicity of trials at the ICC. Because of the interconnectedness of international society, there is little reason to believe that a state official committing egregious human rights violations would lack sufficient notice about their trial at the ICC.

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obligation"); Gary Shaw, *Convicting Inhumanity In Absentia: Holding Trials In Absentia at the International Criminal Court,* 44 GEO. WASH. INT'L L. REV. 107, 109 (2012) ("This Note argues that trials in absentia are necessary at the ICC . . . [to] provide the victims of war crimes and genocide with an official determination of guilt and ensure that the most complete and accurate record of these crimes is maintained.").

217. *Report on the 'Experts' Roundtable on Trials* in Absentia *in International Criminal Justice*, INT'L BAR ASS'N (Sep. 2016), https://www.ibanet.org/document?id=Experts-roundtable-trials-in-absentia [https://perma.cc/GHD5-EDBP].

218. Zakerhossein & de Brouwer, *supra* note 25, at 184–194.

219. *See* Ryan Parry, *The Absconding Accused and the ICC: An Examination on the Legitimacy and Capacity of the International Criminal Court to Hold In Absentia Trials*, GLOBAL JUST. J. QUEEN'S L. (Nov. 2, 2021), https://globaljustice.queenslaw.ca/news/the-absconding-accused-and-the-icc-an-examination-on-the-legitimacy-and-capacity-of-the-international-criminal-court-to-hold-in-absentia-trials [https://perma.cc/HG8E-HLFK] (providing several examples in European Court of Human Rights cases where the Human Rights Committee ruled that in absentia trials violated due process protections).

Finally, critics may argue that *in absentia* trials would be ineffective, given that a fair trial and legitimate verdict depends on the quality of investigations and evidence the OTP has access to. These problems are exacerbated by the issue of State cooperation, and the OTP and the ICC ought to find ways to reduce their reliance on State cooperation to gather evidence.[220] The ICC can decrease its dependence by increasing their use of open-source evidence. As camera and information technology have advanced, individuals have used smartphones and the internet to document and expose human rights violations globally.[221] Although the OTP would need to be cautious regarding the authenticity and security of video evidence,[222] increasing the use of open-source evidence may help the OTP to conduct efficient and fair investigations, even without State cooperation.[223]

CONCLUSION

The ICC and the OTP are currently at a crossroads in addressing egregious human rights violations. The first path leads the ICC and the OTP to prioritize cases they believe are "winnable." This option may seem like a reasonable strategy, but the ICC will continue to face long-term issues of state compliance and legitimacy if it goes down this path. Impunity will continue as the powerful are shielded from the repercussions of their actions, and the individuals that the OTP believes it can successfully prosecute will learn from the actions of more powerful human rights violators to thwart the ICC themselves. The victims of atrocious crimes, like Akhtar Mohammad and his family, will continue to have little hope of justice.

However, there is a second option: not to have a prosecutorial strategy that avoids the crimes of the powerful, but instead one that addresses them head-on. This prosecutorial strategy faces immense resistance from the powerful. To succeed, the ICC and the OTP will

220. Hafetz, *supra* note 42, at 1167.

221. Jay D. Aronson & Enrique Piracés, *Invited Experts on Cyber Evidence Question*, ICC FORUM (June 2020–Jan. 2021), https://iccforum.com/cyber-evidence [https://perma.cc/2EVV-TEN3] ("The widespread availability of mobile phones with high-quality cameras and GPS-enabled features, and the general acceptance of the notion that interesting, unusual, or shocking events ought to be filmed and uploaded to social media, means that more evidence of human rights violations is publicly available today than ever before.").

222. Hafetz, *supra* note 42, at 1167.

223. Aronson & Piracés, *supra* note 222.

have to creatively develop their strategies to hold powerful individuals accountable for their actions, such as through the expansion of *in absentia* trials. Despite challenges that arise in expanding the use of *in absentia* trials and prioritizing the crimes of the powerful, the long-term benefits outweigh the difficulties. Although Prosecutor Khan has indicated that the OTP will prioritize "winnable cases," it is not too late to change course and adopt a prosecutorial strategy that prioritizes the crimes of the powerful and thus more successfully address the long-term goal of ending impunity for all egregious human rights violations.