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Publication date

2022

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Sluiter, G. (Author). (2022). Almost 25 years after its creation, the Russia-Ukraine conflict sadly shows the increasing irrelevance of the International Criminal Court. Web publication or website, Rethinking SLIC. <https://rethinkingslic.org/blog/criminal-law/105-almost-25-years-after-its-creation-the-russia-ukraine-conflict-sadly-shows-the-increasing-irrelevance-of-the-international-criminal-court>

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Criminal law 25.02.2022 Göran Sluiter

Almost 25 years after its creation, the Russia-Ukraine conflict sadly shows the increasing irrelevance of the International Criminal Court

There can be no doubt that the recent Russian aggression towards Ukraine amounts to one of the most important allegations of international crimes since the creation of the International Criminal Court (ICC). The conduct of the Russians in relation to Ukraine since 2014 has provided extensive evidence of war crimes and crimes against humanity.¹ In addition, the crime of aggression has almost certainly been committed twice, once in 2014 by the annexation of the Crimea and now in February 2022 by the invasion of Ukraine as a whole.

In light of these developments of the last eight years and especially looking at Russia's most recent aggression towards Ukraine, one would expect the ICC to be of direct relevance and importance here. These are precisely the types of scenarios for which it was envisaged the Court would react, and where the ICC should play a vital and decisive role in upholding criminal accountability and doing justice to victims, and thereby -hopefully- creating some deterrent effect in respect of future acts of aggression and other international crimes.² For at least three reasons, the role of the ICC in relation to Putin's and Russia's commission of core crimes on Ukrainian territory has thus far been disappointing, and sadly appears indicative of the Court's increasing irrelevance. I will elaborate on these three points in more detail below.

1. The restrictions on the exercise of jurisdiction in respect of the crime of aggression

The negotiations on the crime of aggression were finalised in Kampala, Uganda, and adopted in June 2010.³ After a number of years, the necessary ratifications for the inclusion of the crime aggression were obtained and the Court's jurisdiction over the crime has been activated, meaning that aggression is now a fully applicable crime within the jurisdiction of the Court.⁴ Heralded as a victory for international criminal justice by some in 2010 (even just the fact that agreement on

the amendments was eventually reached was a milestone),⁵ the true test regarding aggression's ultimate usefulness in the ICC's toolbox lies in the answer to the question of whether the Court can respond to acts of aggression in concrete cases, such as we are sadly witnessing in Ukraine these days.

In order to answer this question, it should first be mentioned that the negotiations on the crime of aggression in Kampala were full of difficult compromises. Reaching a relatively solid definition of aggression in Article 8bis of the Statute came at the price of a very high threshold for the exercise of jurisdiction.⁶ The exercise of jurisdiction over the crime of aggression comes, as we see in the ICC Statute, with a set of supplementary conditions in addition to the conditions for the exercise of jurisdiction applicable to other international crimes.⁷ The exercise of jurisdiction over aggression requires either a referral by the Security Council (Article 15ter), where the Russian veto will block every initiative in that direction, or that the State of nationality of the suspect *and* the State on the territory of which the aggression took place or is taking place are party to the Court (Article 15bis (5)).⁸

It now becomes painfully clear that this is an extraordinary deviation from the ordinary jurisdictional requirements applicable to all other core crimes; normally, it would be sufficient for the exercise of jurisdiction in this case that either the State of nationality of the suspect (Russia) or the State of territoriality (Ukraine) is a State party, or would have accepted the Court's jurisdiction on an ad hoc basis under Article 12 (3).⁹ Since Ukraine has accepted the jurisdiction of the Court in both 2014 and 2015,¹⁰ it would mean that under the normal jurisdictional requirements, as set out in Articles 12 and 13, the Court would have been able to exercise jurisdiction over aggression.

The Russian acts of aggression towards Ukraine thus show that the current inclusion of aggression in the Statute is of very limited practical value. States that are both sufficiently powerful, and potentially (or in this case, actually) aggressive, do not tend to be party to the Rome Statute. Moreover, the most powerful States, as in the present case, are also in a position to paralyse the Security Council with their veto.¹¹ Less powerful States, such as Ukraine, now experience first-hand that their acceptance of the ICC's jurisdiction hasn't helped them one bit, while the external aggressor has nothing to fear from the ICC.¹² With hindsight, and experiencing in the present case the effects of the aggression-inclusion and the impotence of the Court in a concrete situation, the Kampala-compromise appears to have been a mistake. It should not have been accepted that a very high jurisdictional wall of protection, benefitting powerful, aggressive States, was erected in the Rome Statute. In my view, this damages the credibility and relevance of the Court more than if an agreement on the inclusion of aggression hadn't been reached. For any observer it is simply impossible to understand how the ICC cannot exercise jurisdiction over the crime of aggression when a State non-party aggressively attacks a State that has accepted the Court's jurisdiction.

2. The lack of progress in the Ukraine investigation

Former ICC Prosecutor Fatou Bensouda initiated the preliminary examination in the situation in Ukraine on 25 April 2014.¹³ This preliminary examination focused on establishing whether there is sufficient evidence for crimes within the jurisdiction of the Court -with the exception of aggression- having been committed on Ukrainian territory since 2014, and also intended to determine whether or not cases arising from the Ukrainian situation would be admissible at the ICC. Essentially, a decision on admissibility was to be decided by determining the existence or prospects of effective national investigations and prosecutions for these crimes.¹⁴ In case of

sufficient evidence and no genuine national investigations or prosecutions, the next step after a preliminary examination is to obtain authorization from the Pre-Trial Chamber under Article 15 (3) to open an official investigation. The latter can result in arrest warrants for suspects, and -after their arrest- in trials.

In December 2020, after more than six (!) years, the ICC Prosecutor concluded the preliminary examination in the Ukraine situation. The Prosecutor found that there was solid evidence ('a reasonable basis to believe') that war crimes and crimes against humanity had been committed on Ukrainian territory since 2014 and that there were no admissibility obstacles.¹⁵ This thus clearly paved the way for the initiation of the authorization procedure under Article 15 (3). However, now that more than a year has passed since this closing of the preliminary examination, a request under Article 15 (3) has yet to be submitted. In her statement of 11 December 2020, Ms Bensouda announced there could be further delays, because of a lack of resources, capacity constraints and therefore the need to re-prioritise cases:¹⁶

Moving forward, the next step will be to request authorisation from the Judges of the Pre-Trial Chamber of the Court to open investigations. The Office faces a situation where several preliminary examinations have reached or are approaching the same stage, at a time when we remain gripped by operational challenges brought on by the COVID-19 pandemic, on the one hand, and by the limitations of our operational capacity due to thin and overextended resources, on the other. This is also occurring in the context of the pressures the pandemic is placing on the global economy. Against this backdrop, in the immediate period ahead, we will need to take several strategic and operational decisions on the prioritisation of the Office's workload, which also duly take into account the legitimate expectations of victims and affected communities as well as other stakeholders. This is a matter that I will also discuss with the incoming Prosecutor, once elected, as part of the transition discussions I intend to have. In the interim, my Office will continue to take the necessary measures to ensure the integrity of future investigations in relation to the situation in Ukraine.

The predicament we are confronted with due to capacity constraints underscores the clear mismatch between the resources afforded to my Office and the ever growing demands placed upon it. It is a situation that requires not only prioritisation on behalf of the Office, to which we remain firmly committed, but also open and frank discussions with the Assembly of States Parties, and other stakeholders of the Rome Statute system, on the real resource needs of my Office in order to effectively execute its statutory mandate.

Overall, the lack of progress in the Ukraine situation is painful and embarrassing for the Court. At the moment of writing, Ukrainian cities and civilians are being attacked on a large scale and there is evidence of war crimes being committed. For every observer, it is clear that there has been a relatively long build-up towards the present situation. There has been aggression towards Ukraine in the past, and, as the Prosecutor already concluded more than a year ago, there is sufficient evidence of war crimes and crimes against humanity committed on the territory of Ukraine, since 2014, for the Prosecutor to move forward. It is extremely difficult to understand why, in face of all these factors, investigations into the Ukraine situation have not been conducted more expeditiously, and with priority. With better focus and a bit more courage -I come back to this point later- arrest warrants for Putin and other major Russian suspects could already have been issued a long time ago.

I also would like to point out that the so-called 'lack of resources'-argument in my view is substantively unpersuasive. If one consults the website of the Court at this very moment, one notices that on 15 February 2022 the ICC has started a full and contested trial against a suspect, Mr. Gicheru, accused of offences against the administration of justice, as penalized in Article 70 of the Statute.¹⁷ Earlier in the Court's existence, the ICC Prosecutor had already invested quite a bit of resources in investigation and prosecution of Article 70-offences against no less than five suspects in the *Bemba et al.* case.¹⁸ Of course, everyone will acknowledge that offences against the administration of justice should not go unpunished, as they can seriously damage the effective functioning of the Court. I am also fully aware of the need to protect victims and witnesses who have faced threats and very real dangers from their involvement in ICC proceedings. However, this does not have to be done by the Court itself. Article 70 (4) of The Statute and Rule 162 explicitly provide for exercise of jurisdiction over Article 70-offences at the national level. The Netherlands, for example, has effectively penalized the Article 70-offences in Article 285a of the Dutch Penal Code and would certainly have looked favourably at any ICC request to prosecute the *Gicheru* or *Bemba et al.* cases.¹⁹ It is therefore in my view not credible at all to claim a lack of resources in relation to investigations in respect of core crimes, whereas a significant amount of resources has unnecessarily been spent, or: wasted, on investigation of Article 70-offences, which could have been dealt with elsewhere.

It also makes for terrible imaging: while the world is on fire, and while terrible crimes are being committed in Ukraine, the ICC is occupied with the Gicheru case.

3. The new Prosecutor may not have the courage to stand up against major powers

It is not only the lack of progress in the Ukraine investigation that is troubling, but also the total silence, since December 2020, on the part of the ICC Prosecutor on the Ukraine situation. Why is that?

I am concerned that there may be reason to believe that the new Prosecutor lacks the courage to stand up against powerful States, and their leaders, and to warn them, in no uncertain terms, that the ICC will respond swiftly and effectively against -major- war crimes and crimes against humanity committed in Ukraine and will not hesitate to investigate and prosecute the highest State officials. This is what the ICC should stand for and I am not persuaded that the current leadership of the ICC Prosecution service is fit for purpose. I will elaborate on this.

First of all, it is important to mention that the current silence on the Ukraine situation, and recent Russian aggression and war crimes, is painfully inconsistent with other situations in which the Prosecutor clearly warned that -further- commission of international crimes would have serious consequences and has called on parties to a conflict to respect international humanitarian law and human rights.

Some -recent- examples:

I call on all parties to the hostilities to fully respect their obligations under international humanitarian law, including by ensuring the protection of civilians. I remain available and willing to engage with all parties to this end. (Afghanistan - <https://www.icc-cpi.int/Pages/item.aspx?name=210817-otp-statement>)

My Office will continue to do what it can to address these serious crimes, including the assault on cultural heritage – our common heritage. My personal visit to Timbuktu on this occasion and

having directly interacted with community leaders and those affected by the destruction brought upon this historic city have only reinforced my belief in the importance of accountability for such crimes. History, whose physical embodiment is at peril through such attacks, will not be generous to our failure to care or act decisively. (Mali - <https://www.icc-cpi.int/Pages/item.aspx?name=21-04-07-otp-statement-mission-mali>)

I call for calm and restraint from all parties, armed groups, political actors and their supporters, and others.

The peaceful course of elections in the Central African Republic is essential to prevent cycles of violence.

In this respect, I wish to repeat previous statements I have made to stress that anyone who commits, orders, incites, encourages or contributes, in any other way, to the commission of crimes under the Rome Statute, is liable to prosecution either before the courts in CAR or the International Criminal Court. (Central African Republic - <https://www.icc-cpi.int/Pages/item.aspx?name=201218-otp-statement-car>)

At the approach of the presidential election to be held on 18 October 2020, I note with great concern recent reports of violence between supporters of the different candidates, and violent clashes between demonstrators and security forces. These recurring episodes of election-related violence are deplorable. They contribute to perpetuating cycles of violence in Guinea. This cycle of violence must end.

I particularly condemn the use of inflammatory rhetoric by some political actors during their electoral campaign, leading to growing ethnic tensions among the people of Guinea. Political leaders are not only obliged to ensure that the electoral process takes place in a transparent and peaceful manner, but are also responsible for preventing and discouraging their supporters from resorting to any type of violence before, during and after the election day. (Guinea - <https://www.icc-cpi.int/Pages/item.aspx?name=201009-otp-statement-guinea>)

I call on all parties and armed groups involved in the fighting to fully respect the rules of international humanitarian law. This includes taking all necessary measures to protect civilians, and civilian infrastructure, including schools, health facilities and detention centres.

In particular, I call on all commanders, be they military or civilian, to take all necessary measures to comply with their individual duty to prevent and punish crimes by subordinates under their effective command or control.

As I have stated, the situation in Libya continues to be a priority situation for my Office. I will therefore not hesitate to expand my investigations and potential prosecutions to cover any new instances of crimes. (Libya - <https://www.icc-cpi.int/Pages/item.aspx?name=200622-otp-statement-libya>)

At a time when abhorrent levels of violence already plague parts of the country, I recall that the International Criminal Court ("ICC" or the "Court") has jurisdiction over Rome Statute crimes committed on the territory of Nigeria. Any person who incites or engages in acts of violence in the context of the upcoming elections or otherwise – including by ordering, inciting, encouraging or contributing to the commission of crimes that fall within ICC's jurisdiction – is liable to prosecution; either by Nigerian Courts or by the ICC. No one should doubt my Office's resolve to

prosecute individuals responsible for the commission of ICC crimes, whenever necessary. (Nigeria - https://www.icc-cpi.int/Pages/item.aspx?name=otp_stat_150316)

In light of the statements above, it is surprising to see that the Prosecutor has in this long build-up towards the current situation of aggression and war crimes in Ukraine been silent. Any possible deterrent effect of statements by the Prosecutor in the present conflict has not been given any chance. In addition, towards the Ukrainian people and individual victims, the Prosecutor has failed to show his commitment and resolve to bring to justice the most responsible for the war crimes and crimes against humanity that have been committed and will be committed. In my view, this silence is simply unforgiveable.

I note that a Twitter message has been sent by the Prosecutor on 25 February 2022, saying that apparently a further statement will follow.²⁰ This is too little and certainly too late. The ICC Prosecutor should have been vocal and active during the build-up towards this catastrophe.

Second, I find that the Court has a questionable -recent- history of making decisions and applying policies that have been considered as being favourable to major States. While such decisions and policies have been based on legal arguments, they are not always persuasive and there is in my view at least the appearance of bias in favour of major powers.

A first example thereof concerns the refusal of the ICC's Pre-Trial Chamber to authorize an investigation into the Afghanistan situation,²¹ after there had been severe criticism and even intimidation from the Trump administration towards the Court.²² Although this decision was overturned on appeal and the Afghanistan investigation could eventually go ahead,²³ the PTC's decision raises concerns as to the Court's strength and resolve in respect of investigations which go against the interests of major powers.²⁴

Another development that should be mentioned here is the termination by former Prosecutor Bensouda of investigations into the alleged UK commission of war crimes in Iraq.²⁵ The Prosecutor tried to pre-empt criticism:

*While this decision might be met with dismay and disappointment by some stakeholders or perceived as an endorsement of the UK's approach by others, the technical reasons set out in the accompanying report should temper both impressions.*²⁶

Commentators have nonetheless expressed concern about the decision unjustifiably favouring the UK's interests.²⁷

As far as the current Prosecutor is concerned, it is important to mention that in a press statement of September 2021, shortly after he started his term in office, he said the following in respect of the Afghanistan situation:

*In preparing to resume my investigation, if authorisation is granted, I am cognizant of the limited resources available to my Office relative to the scale and nature of crimes within the jurisdiction of the Court that are being or have been committed in various parts of the world. I have therefore decided to focus my Office's investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province ("IS-K") and to deprioritise other aspects of this investigation.*²⁸

Under the guise of -again- ‘limited resources’, a decision has been made that greatly favours a major power, in this case the Americans, who have been very much against the Afghanistan investigation from the beginning.²⁹ This statement is tantamount to saying that no American will be investigated in the Afghanistan situation. It has, rightfully in my view, been criticized,³⁰ and cannot be dissociated from the ICC’s overall vulnerability and lack of courage and strength in the face of discontent, intimidation and even threats coming from major powers.

Looking at the situation in Ukraine, the above-mentioned statement coming from the present Prosecutor recently in the Afghanistan situation bodes ill for the Ukrainians. The ICC Prosecutor should be unwavering in his pursuit of justice and should have the courage and stamina to face every type of -future- criticism, intimidation or threats, even when coming from major powers; he should put the interests of justice and victims above anything else.

The Ukraine situation is a true test in which the current Prosecutor can show that any possible concerns as to his position in the face of major powers are unfounded. I am persuaded there is only one way to do that here, attempting to win back some of the Court’s authority and relevance. What is needed is an immediate, clear statement from the Prosecutor condemning Russia’s actions and expressing the highest level of concern over the credible allegations of Russian crimes of aggression, followed by a highly expedited investigation in the Ukraine situation and, eventually, the issuance of an arrest warrant against Putin. Anything below that would in my view be proof of the ICC’s irrelevance.

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¹ See statement of Prosecutor Bensouda of 11 December 2020: ‘Specifically, and without prejudice to any other crimes which may be identified during the course of an investigation, my Office has concluded that there is a reasonable basis at this time to believe that a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine.’ (<https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine>)

² Such deterrence can be both of a general nature, in respect of all other possible wrongdoers, and of a specific nature, aimed at preventing further and future commission of international crimes by Putin and other high ranking Russian military and political leaders.

³ For the outcome of the Kampala Conference, see Resolutions and Declarations adopted by the Review Conference, Part II of the *Review Conference of the Rome Statute of the International Criminal Court Official Records*, ICC Assembly of States Parties, RC/11, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf I was present during these Kampala negotiations as academic observer.

⁴ On 26 June 2016, Palestine became the thirtieth State to ratify the Kampala amendments (see this press release: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>) and in December 2017,

the Assembly of States Parties activated the Court's jurisdiction over the crime of aggression from 17 July 2018 (press release: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>)

⁵ Daniel David Ntanda Nsereko, 'The Kampala Review Conference: the Capstone of the Rome System' (2011) 22 *Criminal Law Forum* 511-518; Claus Kreß and Leonie von Holtendorff, 'The Kampala Compromise of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179-1217.

⁶ Astrid Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last ... in Reach ... over Some' (2010) 2 *Goettingen Journal of International Law* 745-789.

⁷ The law applicable to exercise of jurisdiction over war crimes, crimes against humanity and genocide can be found in Articles 12 and 13 of the Statute. Leaving aside the referral of a situation to the Court by the UN Security Council, the rule of thumb is that the ICC can exercise jurisdiction, either on the basis of a State referral or on the proprio motu initiative from the ICC Prosecutor, in case the State of nationality of the suspect OR the State where the crime was committed is a State-party, or has accepted the jurisdiction of the ICC on an ad hoc basis.

⁸ Phrased negatively, this essential provision of Article 15 reads as follows: 'In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.'

⁹ See supra note 7.

¹⁰ On 27 April 2014, the Government of Ukraine lodged a declaration accepting the Court's jurisdiction over crimes committed on Ukrainian territory between 21 November 2013 and 22 February 2014. On 8 September 2015, Ukraine lodged a second declaration accepting jurisdiction from February 2014 onwards. See: ICC, 'Press Release: Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014' (8 September 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1146&ln=en>

¹¹ For an interesting study on the -illegal- use of veto power in the UN Security Council in case of the commission of international crimes, see: Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge: Cambridge University Press, 2020)

¹² Ukraine had signed but not ratified the Rome Statute when, in 2015, it made its first declaration under Article 12(3) accepting ICC jurisdiction over alleged crimes committed since 20 February 2014. https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf An ongoing question for Ukraine is whether, in the current military context, it would benefit from ratification to become a full member, in the not unlikely event core crimes are committed by Russia.

¹³ ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities 2020' (14 December 2020) <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>
<https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>

¹⁴ For the admissibility requirements, including the effect of *ne bis in idem* protection after national convictions or acquittals, see Articles 17-20 of the ICC Statute.

¹⁵ ICC, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine' (11 December 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine>

¹⁶ Ibid.

¹⁷ ICC, 'Press Release: Gicheru Trial opens at International Criminal Court' (15 February 2022) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1640>

¹⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13

¹⁹ In addition to saving the ICC's scarce resources, investigation and prosecution of Article 70-offences by the Dutch prosecution service has the advantage of full independence from the ICC. Especially in the *Gicheru* case, dealing with alleged interference of witnesses in favour of an ICC accused who was represented by defence counsel who is now the ICC Prosecutor is problematic. Transferring this case to the Dutch prosecution service would have been very welcome, in my view.

²⁰ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have been closely following recent developments in and around Ukraine with increasing concern." 25 February 2022, <https://www.icc-cpi.int/Pages/item.aspx?name=20220225-prosecutor-statement-ukraine>

²¹ Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (ICC-02/17), 12 April 2019.

²² (Then) US National Security Adviser John Bolton threatened to bar ICC judges and prosecutors from entering the US and to target their funds in the US. He stated: "We will prosecute them [ICC judges and prosecutors] in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans", BBC, 'John Bolton threatens ICC with US sanctions' (11 September 2018) <https://www.bbc.com/news/world-us-canada-45474864>; see also: Reuters, 'Trump authorizes sanctions over ICC Afghanistan war crimes case' (11 June 2020), <https://www.reuters.com/article/us-warcrimes-afghanistan-trump-idUSKBN23123A>

²³ Appeals Chamber, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan* (ICC-02/17 OA4), 5 March 2020.

²⁴ Kevin Jon Heller, 'One Word for the PTC on the Interests of Justice: Taliban' (Opinio Juris, 13 April 2019) <https://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/>

²⁵ See ICC, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom' (9 December 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk>

²⁶ Ibid.

²⁷ As one commentator stated: “Afghanistan has to invoke Art. 18 to avoid the stigma of a formal investigation, while the UK avoids that stigma without having to lift a (public) finger. The UK should not have been let off the hook so easily — especially as the OTP has now provided powerful states like Israel and Colombia with a roadmap for how to avoid the public shaming that formal investigation entails”. Kevin Jon Heller, ‘Article 18 and the Iraq Declination’ (Opinio Juris, 12 December 2020) <http://opiniojuris.org/2020/12/12/article-18-and-the-iraq-declination/>

²⁸ ICC, ‘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’ (27 September 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>

²⁹ See supra note 22.

³⁰ Kelebogile Zvobgo, ‘The ICC’s Flawed Afghan Investigation: Why the Court Shouldn’t Let America Off the Hook’ (Foreign Affairs, 3 November 2021) <https://www.foreignaffairs.com/articles/afghanistan/2021-11-03/iccs-flawed-afghan-investigation>

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