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INTRODUCTION

The United States has always had a very complicated and tense relationship with the International Criminal Court (ICC) and with international criminal law generally.[1] Yet, under the Trump administration, the U.S.‑ICC relationship has deteriorated to an unprecedented level. Within the last few years, the U.S. government has launched a full-scale attack on the ICC—denouncing its legitimacy, authority, and achievements, blocking investigations, and loudly withdrawing all once-existing support for the court.

These hostilities bubbled over following the November 2017 request by the ICC Chief Prosecutor, Fatou Bensouda, for the court to open an investigation into alleged war crimes and crimes against humanity committed in Afghanistan since 2003, including those perpetrated by the U.S. military.[2] The U.S. government has always viewed the ICC as an entity designed to infringe on state sovereignty, and Prosecutor Bensouda's request immediately invited harsh retaliation from the Trump administration. The United States, largely through and at the direction of President Trump's former National Security Advisor, John Bolton, took significant

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1 *See generally* Leila Nadya Sadat & Mark A. Drumbl, *The United States and the International Criminal Court: A Complicated, Uneasy, Yet at Times Engaging Relationship* 2–8 (Wash. Univ. in St. Louis Legal Studies Research Paper Series, Paper No. 16-07-02, 2016), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1504&context=wlufac (tracing the history of U.S. involvement in and relationship with the ICC under the Clinton, Bush, and Obama administrations).

2 *See* Press Release, Int'l Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan (Nov. 20, 2017), https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh [hereinafter Press Release on Bensouda's Request for Investigation].

efforts to block all preliminary investigations into the Afghanistan situation, going so far as to revoke Prosecutor Bensouda's visa to enter the United States and threatening economic sanctions if the ICC continued its investigation.[3]

Following the U.S. government's prolonged and very public attack, an ICC Pre-Trial Chamber rejected Prosecutor Bensouda's request, citing the volatility surrounding the proposed investigation and the minimal cooperation the Office of the Prosecutor had encountered to date.[4] The court's language leaves little doubt that the U.S. attack on the ICC and its personnel served as the crux of its decision.

The United States's hostilities come at a time when the ICC is subject to severe global scrutiny. Widespread allegations that the court is unfairly targeting African states and seeking to undermine the sovereignty of its state members has created a "legitimacy crisis" in the court, prompting the withdrawal of several African and Asian states from the Rome Statute.[5] In efforts to counter the global perception that the ICC cares only about African crimes, in 2016, the ICC Office of the Prosecutor (OTP) reiterated a policy of investigating a broad array of crimes committed in geographically diverse locations.[6] In line with this policy, the OTP has begun pursuing preliminary examinations into crimes committed in non-African states, several of which implicate Western powers, including permanent members of the U.N. Security Council.[7] While these investigations have elicited further backlash against the ICC—primarily by Western states—none has sparked as antagonistic and detrimental a response as the proposed investigation into Afghanistan.

The ICC's apparent bending of will to the hostile attacks from the United States presents legitimate concern regarding the future direction of the court, as well as that of international criminal law more broadly. Likewise, in many ways, the ICC's decision significantly undermines U.S. foreign policy initiatives and prerogatives.

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3 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/?utm_term=.c04ad3fd666c.

4 *See* Situation in the Islamic Republic of Afghanistan, No. ICC-02/17, Decision Pursuant to Art. 15 of the Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 94 (Apr. 12, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF [hereafter Pre-Trial Decision on Authorisation].

5 To date, Burundi, the Philippines, and Malaysia have withdrawn from the Rome Statute. *Malaysia Backtracks on Accession to the Rome Statute*, COALITION FOR INT'L CRIM. CT. (Apr. 12, 2019), http://www.coalitionfortheicc.org/news/20190412/malaysia-backtracks-accession-rome-statute; *Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH (Mar. 15, 2019), https://www.hrw.org/news/2019/03/15/qa-international-criminal-court-and-united-states.

6 *See generally* OFFICE OF THE PROSECUTOR, INT'L CRIM. CT., POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 7, at 4–5 (2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

7 *See* Carsten Stahn, *Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC*, 15 J. INT'L CRIM. JUST. 413, 415–16 (2017) (discussing the ICC's opening of preliminary examinations into unlawful killings committed by British troops in Iraq, crimes against humanity and war crimes committed within the Israel-Palestine conflict, and crimes—including those allegedly committed by Russia—in the conflicts within Ukraine and Crimea).

This Essay will examine the complicated history of the U.S.-ICC relationship, as well as the background of and reasons for the court's decision denying Prosecutor Bensouda's request for an investigation into Afghanistan. The Essay will conclude by examining the significant and detrimental impact this decision may ultimately have on both the ICC and U.S. foreign policy.

I. A BRIEF HISTORY OF U.S. RELATIONS WITH THE ICC

The United States bears a convoluted history with the ICC. While the United States played a significant role in the Rome Conference, it quickly became one of the most outspoken opponents of the ICC and ultimately voted against the adoption of the Rome Statute.[8] Notably, the U.S. delegation in Rome identified three primary concerns with the statute: (1) it provided the court with the ability to exercise jurisdiction over non-States Parties; (2) it enabled the Prosecutor to initiate investigations and prosecutions on his or her own authority; and (3) it did not require Security Council authorization before bringing a case of aggression before the court.[9]

Despite these concerns, a growing domestic opposition to ICC jurisdiction, and a conflicted presidential cabinet, on December 31, 2000, shortly before the conclusion of his term and on the last day the Rome Statute was open for signature, then President Bill Clinton signed the Rome Statute.[10] Yet, in his signing statement, President Clinton recognized the court's "significant flaws," notably the first objection raised by the U.S. delegation to the Rome Conference.[11] He further announced his recommendation that President George W. Bush, as his successor, not immediately submit the Rome Statute to the Senate for ratification.[12]

Under the subsequent Bush administration, tensions between the United States and the ICC heightened significantly. In August 2002, Congress enacted the American Servicemembers' Protection Act, which aimed to shield members of the U.S. armed forces from international prosecution by the ICC and even authorized the U.S. President to use "all means necessary and appropriate" to obtain the release of American soldiers from ICC detention.[13] The United States also negotiated—largely through political intimidation—approximately one hundred bilateral

8 *See* Stephen Eliot Smith, *Definitely Maybe: The Outlook for U.S. Relations with the International Criminal Court During the Obama Administration*, 22 FLA. J. INT'L L. 155, 160 (2010).

9 Sadat & Drumbl, *supra* note 1, at 4. In total, the delegation recognized six objections to the Rome Statute, the remaining being (1) that the statute did not include a ten-year opt-out period for the court's jurisdiction; (2) a resolution appended to the statute proposing that drug crimes and terrorism be included within the court's jurisdiction; and (3) that the statute did not allow for states to make any reservations prior to signing. *Id.* at 4, n.14.

10 *See* John P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes Toward International Criminal Courts and Tribunals*, 18 EUR. J. INT'L L. 277, 293 (2007).

11 Press Release, White House, Statement by the President: Signature of the International Criminal Court Treaty (Dec. 31, 2000), http://clinton4.nara.gov/textonly/library/hot_releases/December_31_2000.html.

12 Smith, *supra* note 8, at 161.

13 *See id.* at 162 (quoting 22 U.S.C. § 7427(a) (2012)).

"nonsurrender" agreements, under which States Parties agreed not to surrender any American citizen sought by the ICC who entered their state territory.[14] Finally, and most importantly, in a letter sent by John Bolton, then U.S. Ambassador to the United Nations and later the National Security Advisor under President Trump, the Bush administration notified the United Nations that it had "unsigned" the Rome Statute,[15] which Bolton has famously cited as "his happiest moment."[16]

The United States's animosity towards the ICC melted slightly under the Obama administration, which sought to "end hostility towards the ICC and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice."[17] President Obama even voted for the U.N. Security Council resolution that referred to the ICC the situation in Libya involving the brutal violence against protestors of the Muammar Gadaffi regime, and remarkably lobbied other Council States to do the same.[18] Yet, despite these improvements in the United States's relationship with the ICC, the Obama administration still refused to submit the Rome Statute, which it viewed as "flawed," to the U.S. Senate for a vote on ratification.[19] As one commentator recognized, while the Obama administration discontinued the expression of open hostilities towards the court, it did not "abandon the conservative policies that distance and protect America from the ICC."[20]

The U.S. government's hesitation toward and apparent distrust of the ICC essentially boils down to one primary concern: the possibility that U.S. citizens may be prosecuted and convicted by the court for conduct ordered or supported by the U.S. government.[21] And this concern is not unfounded. The United States has an

14 *See* Cerone, *supra* note 10, at 296; *see also* Eric M. Meyer, *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act*, 58 OKLA. L. REV. 97, 99 (2005) (recognizing that the American Servicemembers' Protection Act contained a provision prohibiting the U.S. from providing military assistance to any ICC State Party unless the State Party has signed a bilateral nonsurrender agreement or is subject to a relevant exception).

15 *See* Letter from John R. Bolton, Under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, U.N. Sec'y Gen. (May 6, 2002), https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.

16 John B. Bellinger III, *International Law and the Foreign Affairs Challenges for the Next Administration*, 48 GEO. J. INT'L L. 909, 913 (2017).

17 Jean Galbraith, *Trump Administration Expresses Strong Disapproval of the International Criminal Court*, 113 AM. J. INT'L L. 169, 169 (2019) (quoting Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT'L L. 525, 534 (2013) (quoting Secretary of State Hilary Clinton)).

18 Megan A. Fairlie, *The United States and the International Criminal Court Post Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528, 529 (2011) (noting further that the Obama administration sent representatives to the ICC's annual meeting of the Assembly of States Parties in 2009 and sent a number of Americans to attend and observe the ICC Review Conference in Uganda in mid-2010).

19 *See* Bellinger, *supra* note 16, at 913–14.

20 *See* Brett D. Schaefer, *Beating the ICC*, HERITAGE FOUND. (Feb. 18, 2013), https://www.heritage.org/global-politics/commentary/beating-the-icc.

21 *See* Steven Veenema, *Willful Ignorance—Contextualizing U.S. Policy Toward the International Criminal Court*, 30 SUFFOLK TRANSNAT'L L. REV. 167, 181–83 (2006) (noting as

unfortunate history of engaging in internationally prohibited conduct in times of armed conflict, including its widespread use of chemical weapons in Vietnam and the abuse and torture of prisoners of war at Guantanamo Bay and Abu Ghraib.[22]

Thus, when the ICC began intimating its intent to investigate U.S. involvement in alleged war crimes and crimes against humanity committed in Afghanistan, the Trump administration found serious cause for concern and ultimately reignited the American fight against the ICC. Unfortunately, this fight has proven detrimental to both sides.

II. THE REQUEST TO OPEN AN INVESTIGATION INTO THE AFGHANISTAN SITUATION

Afghanistan has experienced several civil wars and decades of internal unrest since the 1970s, culminating in the U.S. invasion and subsequent international conflict following the September 11, 2001 terrorist attacks.[23] In 2006, the ICC OTP initially opened a preliminary examination into alleged crimes committed in Afghanistan[24] Little documented progress was made within the preliminary examination until November 2017, when Prosecutor Bensouda sought to proceed with an investigation into alleged war crimes and crimes against humanity committed in Afghanistan since May 1, 2003, as well as closely linked crimes committed in other States Parties' territories since July 1, 2002.[25] Because Prosecutor Bensouda intended to initiate the investigation *proprio motu*, or on her own authority, she requested judicial approval from the ICC Pre-Trial Chamber to open the investigation, as required by Article 15 of the Rome Statute.[26] The request specifically proposed investigation into three categories of crimes: (1) crimes against humanity and war crimes committed by the Taliban and related armed groups (i.e., the Haqqani Network); (2) war crimes committed by the Afghan National Security Forces; and (3) war crimes committed by members of the U.S. armed forces in Afghanistan, as well as by the CIA in secret detention facilities within Afghanistan and on the territory of other States Parties.[27]

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well that the U.S. fear that an ICC Prosecutor could question U.S. judicial action and determine "that any U.S. prosecution or investigation constituted a failure to genuinely prosecute").

22 *See generally* Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005) (detailing and questioning the international legality of the prisoner abuses at Guantanamo Bay and Abu Ghraib).

23 *See Afghanistan*, COALITION FOR INT'L CRIM. CT., http://www.coalitionfortheicc.org/country/afghanistan (last visited Aug. 9, 2019).

24 *See* Press Release on Bensouda's Request for Investigation, *supra* note 2.

25 *Id.*

26 Rome Statute of the International Criminal Court art. 15, ¶¶ 1, 3, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (requiring that the Prosecutor "submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected," and permitting the opening of the investigation only upon the Pre-Trial Chamber's authorization of same, "without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of the case") .

27 Press Release on Bensouda's Request for Investigation, *supra* note 2.

Prosecutor Bensouda's request embodied two of the primary objections the United States has consistently maintained against the ICC since the Rome Conference: the power of the court to exercise jurisdiction over nonstates parties (including the United States), and the power of the prosecutor to initiate investigations on her own authority.[28] In response to Prosecutor Bensouda's request, on September 10, 2018, John Bolton delivered an address attacking the ICC and its decision to continue investigations into the U.S. military's role in Afghanistan.[29] Bolton labeled the court as a threat to American sovereignty and national security interests and promised that the United States would take "any means necessary" to protect its citizens and citizens of allied nations "from unjust prosecution by this illegitimate court."[30] He also vowed not to provide the ICC with any further American cooperation or assistance, deciding instead to "let the ICC die on its own."[31] While Bolton's attack was met largely with international condemnation,[32] it still posed a sizable threat to the court's legitimacy.

The ICC succinctly addressed Bolton's virulent speech by recognizing that it would be "undeterred" in its mission to bring justice to communities affected by perpetrators of international crimes.[33] Yet, in March 2019, Secretary of State Mike Pompeo announced that the United States would revoke or deny visas to ICC personnel coming to the United States for purposes related to the investigation into the situation in Afghanistan.[34] In April 2019, the United States revoked the entry visa for Prosecutor Bensouda and, through Pompeo, threatened to take additional steps, including economic sanctions, if the ICC continued its investigation.[35]

On April 12, 2019, these escalating pressures culminated in a unanimous decision by the three judges on ICC Pre-Trial Chamber II (PTC) rejecting Prosecutor Bensouda's request to proceed with the investigation.[36] In its decision, the PTC first recognized that the intent of Article 15 of the Rome Statute in requiring judicial

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28 Veenema, *supra* note 21, at 181.

29 Galbraith, *supra* note 17, at 169.

30 Matthew Lee, *Bolton: International Criminal Court 'Already Dead to Us'*, ASSOCIATED PRESS (Sept. 11, 2018); https://www.apnews.com/4831767ed5db484ead574a402a5e7a85.

31 Galbraith, *supra* note 17, at 170.

32 *See* Alex Moorehead & Alex Whiting, *Countries' Reactions to Bolton's Attack on the ICC*, JUST SECURITY (Sept. 18, 2018), https://www.justsecurity.org/60773/countries-reactions-boltons-attack-icc/; *see also* Harold Hongju Koh, *The Trump Administration and International Law: A Reply*, OPINIO JURIS (Oct. 16, 2018), http://opiniojuris.org/2018/10/16/the-trump-administration-and-international-law-a-reply/ (noting that the only states to offer support to Bolton's speech were those with officials under investigation by the ICC, including Sudan and Burundi).

33 Press Release, Int'l Criminal Court, The ICC Will Continue Its Independent and Impartial Work, Undeterred, ICC-CPI-20180912-PR1406 (Sept. 12, 2018), https://www.icc-cpi.int/Pages/item.aspx?name=pr1406.

34 Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html (referencing Pompeo's comments made in a March 2019 press briefing directed to ICC investigators and personnel stating they "should not assume that you will still have or will get a visa, or that you will be permitted to enter the United States").

35 Kelley, *supra* note 3.

36 *See generally* Pre-Trial Decision on Authorisation, *supra* note 4.

authorization for a *propio motu* investigation is partly to prevent "[f]rivolous, ungrounded or otherwise predictably inconclusive investigations [that] would unnecessarily infringe on fundamental individual rights without serving either the interests of justice or any of the universal values underlying the Statute."[37] It then cited the standard imposed by Article 15, requiring that the Prosecutor present a "reasonable basis to proceed with [the] investigation."[38] In determining whether the Prosecutor has done so, the PTC recognized that it must consider: (1) whether the crime falls within the jurisdiction of the court; (2) whether the case is admissible (with regard to the requisite gravity of the alleged crimes and the Rome Statute's complementarity requirement); and (3) whether there are "nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[39] The PTC then determined that in considering the third factor, requiring that the investigation be "in the interests of justice," it needed to weigh the gravity of the alleged crimes, the victims' interests, and the potential feasibility of the investigation.[40]

After positively finding that Prosecutor Bensouda's proposed investigation met the jurisdictional and admissibility requirements of the Rome Statute,[41] the PTC then ultimately determined that the investigation, which had already been met by "severe constraints and challenges,"[42] would not serve the "interests of justice."[43] In so doing, the PTC noted the minimal cooperation the OTP had experienced from authorities in investigating the crimes, the "complexity and volatility of the political climate still surrounding the Afghan scenario," and the significant time that has elapsed since the alleged commission of the crimes.[44] Despite recognizing that 680 out of 699 applications submitted to the court by victims and victims groups welcomed the requested investigation,[45] the PTC concluded that the aforementioned circumstances made prospects of a successful investigation unlikely and that the investigation thus ran afoul of the interests of justice.[46]

37 *Id.* ¶ 34.

38 *Id.* ¶ 29.

39 *Id.* ¶ 87. The PTC noted these factors are set forth in Article 53 of the Rome Statute, which governs the standard appropriate for a Prosecutor to determine whether there is a "reasonable basis to proceed with an investigation." *See id.* ¶ 29; *see also* Rome Statute, *supra* note 26, art. 53(1).

40 Pre-Trial Decision on Authorisation, *supra* note 4, ¶ 35.

41 *See id.* ¶¶ 48, 66 (finding that the alleged crimes fell within the Rome Statute); ¶¶ 79, 86 (finding the admissibility requirement satisfied both with regard to complementarity and the gravity of the alleged crimes).

42 *Id.* ¶ 44.

43 *Id.* ¶ 87.

44 *Id.* ¶¶ 93–94.

45 *Id.* ¶ 87. Article 15 of the Rome Statute explicitly provides that victims may make representations to the Pre-Trial Chamber either in support or opposition to the Prosecutor's request for an investigation. Rome Statute, *supra* note 26, art. 15(3).

46 Pre-Trial Decision on Authorisation, *supra* note 4, ¶ 96.

III. THE IMPACT OF THE PRE-TRIAL CHAMBER'S DECISION

Prosecutor Bensouda's request to open an investigation into the situation in Afghanistan embodied the primary concerns voiced by the United States since the negotiations of the Rome Statute. It presented a concrete possibility of investigation and prosecution of not only U.S. citizens, but of high-ranking military and state officials. Viewed through this lens, the Trump administration's backlash to Prosecutor Bensouda's request is far from surprising. Yet, the ICC's response to U.S. hostilities in denying the investigation request has potentially drastic implications both for the court's legitimacy and for U.S. foreign policy.

The PTC's decision does little to assuage criticism of the court's exclusive focus on prosecuting African crimes. In fact, by rewarding the United States for its failure to cooperate, the PTC sends the message that Western powers are immune from international prosecution for war crimes, especially when they act to pose obstacles to OTP investigations. The PTC's decision is a clear example of the ICC succumbing to American pressures and sweeping heinous crimes under the rug in an effort to ensure goodwill with members of the U.N. Security Council. Specifically, this sets dangerous precedent undermining the OTP's recent efforts to expand its geographic reach. This is especially concerning given the open preliminary examination into alleged war crimes committed by UK nationals in the context of the Iraq conflict between 2003 and 2008.[47] Like the Afghanistan situation, any investigation opened within the Iraq‑UK situation would most likely be through Prosecutor Bensouda's *propio motu* authority.[48] The PTC's decision logically encourages UK officials to refuse cooperation to the greatest extent possible in an effort to render infeasible any potential investigation into British war crimes.

While the PTC's decision has been met largely with outrage,[49] one group of scholars has applauded the PTC's decision on the ground that it marks a policy shift towards devoting the court's minimal resources only to those investigations that

47 *See Preliminary Examination: Iraq/UK*, INT'L CRIM. CT., https://www.icc-cpi.int/iraq (last visited Aug. 10, 2019).

48 *See* Press Release, Int'l Criminal Court, Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq (May 13, 2014), https://www.icc-cpi.int//Pages/item.aspx?name=otp-statement-iraq-13-05-2014 (noting that while the preliminary examination was concluded in 2006, Prosecutor Bensouda reopened the preliminary examination in May 2014, following receipt of new information supporting allegations that British officials were involved in "systematic detainee abuse in Iraq from 2003 until 2008").

49 *See, e.g.*, *Afghanistan: ICC Refuses to Authorize Investigation, Caving into USA Threats*, AMNESTY INT'L (Apr. 12, 2019), https://www.amnesty.org/en/latest/news/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats/ (opining that the decision "marks a shocking abandonment of victims and will further weaken the court's credibility"); Christian De Vos, *No ICC Investigation in Afghanistan: A Bad Decision with Big Implications*, INT'L JUSTICE MONITOR (Apr. 15, 2019), https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/ (noting that the decision "surprised and angered many").

yield a strong likelihood of success.[50] This view further promotes an ICC focused only on crimes that do not implicate states with close ties to the United Nations, further alienating the developing Asian and African states who already feel victimized by the court. Moreover, there is no evidence that this decision marks any new policy towards focusing exclusively on investigations and prosecutions in which the states or parties involved are highly cooperative. Indeed, the court continues to pursue a case pertaining to crimes committed in the government of the Philippines' "war on drugs" campaign, even though the Philippines objected so strongly to the ICC's opening of a preliminary examination that it withdrew from the Rome Statute.[51] Thus, marking the PTC decision as representative of a policy shift in favor of efficiency is unrealistically optimistic.

Further, while the Trump administration has labeled the PTC's decision a "major international victory,"[52] the United States's apparent disdain for the ICC significantly compromises the nation's status as a proponent of global justice. The Trump administration's conduct in rebuking the authority and the legitimacy of the only permanent court established to prosecute crimes committed at an international level undermines U.S. policy in bringing perpetrators of worldwide atrocities to justice.[53] By calling for the death of the ICC, the Trump administration has concretized the United States's reputation as an international bully and has sought to eradicate an institution that oftentimes provides the sole means for bringing brutal dictators and atrocity perpetrators to justice.

The Trump administration's actions also undermine U.S. foreign policy initiatives. By taking a very public, very loud offensive to the ICC's Afghanistan decision, the United States has welcomed impunity for atrocities committed by the Taliban and affiliated groups deemed as terrorist organizations by the U.S. Department of State.[54] The United States's constant pressure on the ICC resulted in the PTC's decision to block Prosecutor Bensouda's requested investigation in its

50 *See* Alex Whiting, *The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/ (recognizing the PTC's decision as "the beginning of a broader effort by the judges and the Prosecutor to orient the Court's very limited resources toward those investigations where there exists some meaningful prospect of success").

51 *The Philippines: Preliminary Investigation*, INT'L CRIM. CT. (last visited Oct. 5, 2019), https://www.icc-cpi.int/philippines (noting that despite the Philippines' withdrawal, the ICC "retains its jurisdiction over crimes committed during the time in which the State was party to the Statute and may exercise this jurisdiction even after the withdrawal became effective").

52 Press Release, White House, Statement from the President (Apr. 12, 2019), https://www.whitehouse.gov/briefings-statements/statement-from-the-president-8/.

53 *See* David Scheffer, *Ambass. David Scheffer on John Bolton's Announcement of "Ugly and Dangerous" Punitive Actions Against Judges, Prosecutors of Int'l Criminal Court*, JUST SECURITY (Sept. 10, 2018), https://www.justsecurity.org/60678/ambass-david-scheffer-john-boltons-announcement-ugly-dangerous-punitive-actions-judges-prosecutors-intl-criminal-court/.

54 *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2017, at 294 (2018), https://www.state.gov/wp-content/uploads/2019/04/crt_2017.pdf (providing a description of the organization and terrorist activities of the Haqqani Network, which was designated as a Foreign Terrorist Organization by the Department of State on September 19, 2012).

entirety, meaning that the OTP lacks judicial authorization to investigate any of the three categories of crimes listed in Prosecutor Bensouda's request, including those committed by the Taliban. This is especially concerning, not only because of the gravity of the Taliban's atrocity crimes, but also because—unlike the alleged crimes committed by Afghan forces and the U.S. military—the OTP had obtained meaningful cooperation from both international and domestic organizations in Afghanistan and had compiled significant evidence connecting the Taliban to these alleged crimes.[55] The Trump administration's rash and selfish attack on the ICC has effectively prevented one of the world's most feared and despised terrorist organizations from facing repercussion for some of its most heinous crimes.

More broadly, the Trump administration's hostilities against the ICC undermine U.S. foreign policy initiatives advocating for the international prosecution of atrocities perpetrated abroad. For instance, the Trump administration has maintained a policy of bringing to justice those responsible for the persecution of Rohingya Muslims in Myanmar,[56] which the U.N. has labeled a "textbook example of ethnic cleansing."[57] While the Trump administration has noted "serious concerns" regarding the capability of Myanmar's domestic judicial system to adequately prosecute those crimes, it has also failed to provide a valid option for a judicial mechanism that would be capable of rendering appropriate justice.[58] The United States's refusal to acknowledge the potential of the ICC, which has recognized jurisdiction over certain aspects of the Rohingya situation and currently appears to be the only criminal law mechanism capable of achieving justice for the Rohingya,[59] not only portrays the current administration as illogical and uncooperative, but more importantly disadvantages the victims of these crimes. If the current administration is—as it claims—striving to achieve justice for the Rohingya and similarly situated victims of internationally recognized crimes, its failure to cooperate and support the ICC essentially renders this goal unattainable.

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55 *See* Kevin Jon Heller, *One Word for the PTC on the Interests of Justice: Taliban*, OPINIO JURIS (Apr. 13, 2019), http://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/.

56 Beth Van Schaack, *Trump vs. International Law: The Trump Administration and International Criminal Justice*, OPINIO JURIS (Oct. 9, 2018), http://opiniojuris.org/2018/10/09/trump-vs-international-law-the-trump-administration-and-international-criminal-justice/.

57 Zeid Ra'ad Al Hussein, United Nations High Comm'r for Human Rights, Opening Statement at Thirty-Sixth Session of Human Rights Council (Sept. 11, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E.

58 *See* Schaack, *supra* note 56 (citing Heather Nauert, Spokesperson, U.S. Dept. of State, Department Press Briefing, (Sept. 18, 2018), https://www.state.gov/r/pa/prs/dpb/2018/09/286027.htm).

59 In September 2018, the ICC Pre-Trial Chamber I issued an advisory opinion holding that certain crimes against the Rohingya, including forced deportation, in which one element of the crime occurred in the ICC State Party of Bangladesh, fell within the jurisdiction of the Rome Statute. *See generally* Request Under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Decision on the Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF.

Finally, the Trump administration's attack on the ICC and the subsequent PTC decision is most detrimental to the victims of the heinous crimes committed in Afghanistan. A 2017 report issued by the Office of the Prosecutor on the investigation into Afghanistan included tentative estimations that the Taliban and its affiliated groups were responsible for 17,000 civilian deaths, 7000 of which were the result of deliberate and targeted civilian attacks, including attacks on schools, shrines, mosques, and humanitarian organizations' offices.[60] The ICC's decision to close the investigation at the bullying hands of the Trump administration rewards the perpetrators of these crimes with temporary, and possibly complete, impunity. Again, not only does this impunity contribute to issues of instability within the Afghani government and society, but it further undermines U.S. policy to bring to justice those Taliban leaders responsible for these mass atrocities, many of whom also targeted U.S. military personnel.

CONCLUSION

In June 2019, Prosecutor Bensouda filed a request seeking clearance to appeal the PTC's decision denying the investigation.[61] Likewise, legal representatives for eighty-two victims of all three categories of crimes listed in the investigation request have lodged their appeal of the PTC decision with the ICC Appeals Chamber with oral arguments conducted in December 2019.[62] In addition, several former U.N. Special Rapporteurs, international experts, and international organizations, including Amnesty International and Human Right Watch, among others, have filed requests to submit amicus curiae observations with the ICC, arguing that the Pre-Trial Chamber erred in finding that opening the investigation into Afghanistan would not serve the interests of justice.[63]

It is also important to note that the PTC decision does not completely close the preliminary examination into the situation in Afghanistan. Indeed, Article 15 provides that a denial of authorization "shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation."[64] Yet, even considering the acquisition of new evidence supporting the commission of grave crimes in Afghanistan, given the PTC's "interests of

60 OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, ¶ 246 (Dec. 4, 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Afghanistan_ENG.pdf.

61 Mike Corder, *ICC Prosecutor Asks to Appeal Rejection of Afghanistan Probe*, ASSOCIATED PRESS (June 7, 2019), https://www.apnews.com/5833f2b063624991988d4c75f975589e.

62 *See* Situation in the Islamic Republic of Afghanistan, No. ICC-02/17, Corrigendum of Order Scheduling a Hearing Before the Appeals Chamber and Other Related Matters (Sept. 27, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_05785.PDF. *See generally id.*; Victims' Appeal Brief (June 24, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03328.PDF.

63 Zuzana Drexlerova, *International Experts and Organizations File Requests to Submit Amicus Curiae Observations in ICC Afghanistan Case*, ICL MEDIA REVIEW (Oct. 16, 2019), http://www.iclmediareview.com/16-october-2019-international-experts-and-organizations-file-requests-to-submit-amicus-curiae-observations-in-icc-afghanistan-case?highlight=afghanistan.

64 Rome Statute, *supra* note 26, art. 15(5).

justice" reasoning, it is difficult to see how any proposed investigation could obtain the necessary authorization to move forward.

The full extent of the effects of the current U.S. administration's approach to the ICC, especially with regard to its investigation into Afghanistan, remain yet to be seen. However, its efforts to paint the ICC as an illegitimate, ineffective institution may serve to compromise U.S. national security efforts and foreign policy initiatives. As far as the ICC, substantial speculation remains whether the court will recover swiftly from the backlash of the PTC decision, or whether, as John Bolton has predicted, it will "die on its own."[65]

65 *See* Galbraith, *supra* note 17, at 170 (quoting John Bolton, Remarks to the Washington D.C. Federalist Society: Protecting American Constitutionalism and Sovereignty from International Threats (Sept. 10, 2018), https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/).