



Universiteit  
Leiden  
The Netherlands

## **To what extent is the International Criminal Court impartial in determining its investigations?**

Hout, Claire van

### **Citation**

Hout, C. van. (2023). *To what extent is the International Criminal Court impartial in determining its investigations?*

Version: Not Applicable (or Unknown)

License: [License to inclusion and publication of a Bachelor or Master Thesis, 2023](#)

Downloaded from: <https://hdl.handle.net/1887/3626732>

**Note:** To cite this publication please use the final published version (if applicable).



Universiteit  
Leiden

---

# Bachelor Thesis

To what extent is the International Criminal Court  
impartial in determining its investigations?

Claire van Hout  
S2846667

Accountability for Human Rights Violations  
Dr Gjovalin Macaj

Word Count : 7022  
26/05/2023

## **Abstract**

This paper has researched the extent of impartiality of the ICC in determining their investigations. The justifications behind the cases of Iraq/UK and Afghanistan/US were explored, to find out how the ICC reached the decision to stop investigating the UK and to leave out the US in their examination. This has been done with a discourse analysis, based on the theoretical distinction of an ethics of conviction and an ethics of responsibility. This analysis has shown that in the case of Iraq, the ICC referred more to the rule of law and legal criteria, where in the case of Afghanistan the discourse included both signs of impartiality, but also signs that practical and political considerations played a role. This thesis thus concludes that the extent of impartiality in the case of Iraq was higher than that in Afghanistan.

## Table of Contents

<b>Introduction</b>	.....	<b>p. 1</b>
<b>Theoretical Framework</b>	.....	<b>p. 3</b>
<b>Research Design</b>	.....	<b>p. 6</b>
<b>Results and discussion</b>	.....	<b>p. 8</b>
<b>Conclusion</b>	.....	<b>p. 15</b>
<b>References</b>	.....	<b>p. 18</b>

## Introduction

In 2002, the International Criminal Court was established with the idea of it being an independent Court, which would not be subject to political control and whose decisions are based on legal criteria (ICC, 2020, p. 14). However, it is important to note that a legal institution like the International Criminal Court cannot operate in a vacuum. They “cannot disentangle themselves from the political dimensions of the lived realities they engage with and the influences and restraints exerted by the international community and its components” (Carofiglio, 2015). These political constraints mean that ‘victims’ access to justice often depends on political calculations’ (Vignoli, 2023). The puzzle that will be addressed here is how the Court is simultaneously an independent institution aiming to deliver impartial justice, while operating in a highly politicized world. The literature about this puzzle is extensive with most scholars having similar conclusions about it. There is a broad consensus on the importance of impartiality. As Roach puts it, ‘The court...was never intended to serve a diplomatic function that would threaten or undermine its impartiality and neutrality’ (2013, p. 512). These ideas of impartiality however are not always easy to achieve in a politicized world, since the political context will heavily influence the success rate of the court in helping to end impunity ‘for the most serious international crimes’ (Pitty, 2006, p. 347).

The way the Court has navigated these political tensions has led to some criticism, with the literature pointing to the aspect of ‘inconsistency’ as a reason. Kersten (2018) therefore calls for greater consistency and transparency, especially in the selection criteria of the Office of the Prosecutor, and in the practice of these criteria. With these criticisms, it is important to see what kind of process has led to these results and what the justifications are behind decisions made by the Court. Therefore, this research explores the question: To what extent is the International Criminal Court impartial in determining its investigations? This will be done by looking at cases where the ICC has limited the scope of its mandate, by either stopping the examination, as in the case of UK/Iraq or by leaving certain actors out of the scope of the investigation, which was the case with the United States in Afghanistan.

While the legal framework for preliminary examinations, set out in article 17 of the Rome Statute, means that jurisdiction and the interests of justice should also be considered, the admissibility criteria of gravity and complementarity are especially relevant for this thesis (OTP, 2013, p. 2). As will be explained in the case selection, the use of these criteria were contested in both cases and it is therefore interesting to look at how these decisions were made. More pertinent to this research however, is that these two criteria help to assess the

extent of impartiality of the Court, and thereby contribute to the gap in the literature. As shown, the literature focuses on the importance of impartiality, but it has not clearly addressed why the ICC limits their mandate in certain investigations, but not in others. Is it true that it has to do with legal criteria like gravity and complementarity, or are other factors in play, like for example political pressures? Another thing that adds to this gap, is the fact that the prosecutor of the ICC has much discretion in analyzing the admissibility criteria of a crime, which could lead to a lack of transparency, making it important for the ‘OTP to communicate as clearly as possible which factors were in fact relevant to its decisions in each context’, in order to enhance the legitimacy of the Court (Murphy, 2006, p. 283 ; Sácouto & Cleary, 2008, p. 854).

This thesis aims to see which factors were relevant to the decisions in Afghanistan and Iraq. The expectation thereby is that the ICC will remain impartial for the most part, but this thesis also expects the case of Afghanistan/US to have a lesser extent of impartiality than that of Iraq/UK. This is expected because the US has been known to have a complex relationship with the ICC (Ochs, 2019), which could mean that their influence on the Court could be bigger than that of the United Kingdom.

Before researching this empirically, it must first be established why this topic is worth exploring. The significance of this research is that the ICC is meant to help victims of international crimes and to help end impunity. If it fails to do so by limiting their mandate in some cases, the ICC risks perpetuating double standards, which would mean that some actors are not held accountable for their human rights violations. This idea of impartiality is especially relevant at this time of writing, since the war in Ukraine has created an ‘unprecedented financial and operational support’ for the International Criminal Court (Vasiliev, 2022, p. 893). Ambos also underscores the significance of the West (and an actor like the ICC) being consistent, since the approach to the Russian aggression is in strong contrast with previous inconsistencies of the ICC, ‘especially of its prosecutorial policies’ (2022, p. 885) . In sum, it is rare to see that such a powerful political actor like Russia is being investigated, and it begs the question why this has not been the case in other situations that fall under the ICC’s mandate.

The thesis is structured as follows. First, the theoretical framework of an ethics of conviction and the ethics of responsibility is discussed. Second, the research design is explained, with a detailed look into the method of analysis and the case selection. Third, both the background of the cases of Afghanistan and Iraq and the results of the discourse analysis

are presented. The research concludes by summarizing the argument, discussing the limitations of this paper and by mentioning ideas for future research.

### **Theoretical Framework**

In this theoretical framework, the factors that influence the Court's work will first be discussed. Second, the main theoretical approaches to the operation of the ICC are given. Last, the ethics of responsibility and conviction by Max Weber are explained, as well as why this theoretical distinction is best suited for the research question.

Decisions by the ICC can be shaped by multiple factors. On the one hand, there is the principle of ending impunity, for the 'perpetrators of the most serious crimes of concern to the international community as a whole and thus contribute to the prevention of such crimes' (ICC, 1998, p. 1). However, there are also political interests of states involved, think of for example the relationship between the ICC and the United Nations Security Council (Carifiglio, 2015). What is also noticed in the literature, is that the amount of resources the ICC has strongly influences what they are capable of. The ICC often does not have enough financial support to fulfill their goals (Rodriguez-Pareja & Herencia-Carrasco, 2015). Lastly, there is also the idea of the rule of law and impartiality, with a strict interpretation of the legal criteria. (ICC, 2020, p. 14)

The theoretical framework must thus take into account all such explanations. The two main contrasting theories often applied to the operation of the ICC are legalism and realism. As Bosco (2004, p. 3) puts it, the ICC can be seen as a march toward the rule of law, which was 'conceived of as a march away from something else : politics and expediency'. The idea of legalism can then be defined as law aiming at justice, being both neutral and objective (p. 3). The ICC and their way of operating is a 'striking advance for the legalist worldview against the traditional concept of sovereignty' (p. 4). This more traditional idea of sovereignty can be found in the idea of realism. Realism and its scholars view courts as 'extensions of existing power realities' (Bosco, 2004, p. 11). The expectation there is that states are unlikely to cooperate with the Court if they cannot significantly control it, which leads to them either marginalizing the Court or trying to control them (p. 11).

While these theories are relevant, they do not take into account all the factors that guide the ICC's decisions. Therefore, the choice has been made to apply the two distinctions that Max Weber makes in 'the Vocation Lectures'. This is because this approach is both inclusive of all the factors that guide the Court's work, as discussed above, and it provides

clarity. Before moving on, this theory by Max Weber must first be explained. Weber states that all ‘ethically oriented action’ (2004, p. 83) can be guided by either an ‘ethics of conviction’ or an ‘ethics of responsibility’. A clarification of this distinction must be addressed here. It is important to keep in mind that an ethics of conviction does not mean irresponsibility, or that an ethics of responsibility means that there is no conviction at all. However, as Max Weber puts it, ‘there is a profound abyss between acting in accordance with the maxim governing an ethics of conviction and acting in tune with an ethics of responsibility’ (2004, p. 70).

An ethics of responsibility is defined as having to take into account the foreseeable consequences of one’s actions. One has absolutely no right to assume perfection and must realize that human failings are possible and that those must be ascribed to the one performing the actions (Weber, 2004, p. 84). What is seen here is a combination of both realism and the idea of prudence. A realist perspective on international law is that of ‘law reflecting the preferences of the powerful’ (Krasner, 2002, p. 266). The author states that ‘when international law is violated there are no neutral or authoritative enforcement mechanisms to make the offending party pay. A state that transgresses international legal rules will be punished only if other more powerful states want to do it. What matters is not the rules but the power ‘ (Krasner, 2002, p. 266). Therefore, if the ICC is investigating those more powerful states against their will, it could lead to consequences of those states not cooperating or even undermining the legitimacy of the Court. It could therefore be that an institution like the ICC is prudent, meaning that they exercise their mandate in a careful way, taking into account the possible political consequences. Practical consequences can also play a role in guiding the Court’s work. Finances, for example, play a big role, since the Court is given a budget that allows for only a handful of prosecutions per year (deGuzman, 2012, p. 267). Thus, in deciding what cases the ICC investigates, it also acknowledges that the small budget they have should be spent in a way that advances their goals, knowing that they cannot afford to ‘waste’ money on cases where the success rate for conviction is low. There are many more practical considerations before the Court, for example the likelihood that a suspect will be apprehended (Sacouto & Cleary, 2008, p. 810).

The following hypothesis stems from this ethics of responsibility :

H1 : Limitations in the mandate of ICC investigations reflect both political and practical considerations.

On the other hand, there is the ethics of conviction, which differs from the logic mentioned above. It is more idealistic and leaves out the importance of consequences. As Weber (2004) mentions, this is best described as a Christian doing what is right and thereby leaving the outcomes of those actions to God (p. 71). The central idea here is to ensure that ‘the flame of pure conviction should never be extinguished’ (p. 84) and therefore doing what is right, regardless of the (evil) consequences. When looking at the factors that influence the work of the Court, the idea of impartiality and legalism go hand in hand with the ethics of conviction. If the ICC has a strict interpretation of the law, this means that they are impartial and guide themselves by what the law says (and not by what political actors tell them to do). This ethics of conviction contains more ideological considerations, as emphasized by a theory like constructivism. This idea is also strongly related to a ‘logic of appropriateness’. This logic can best be described as :

A perspective that sees human action as driven by rules of appropriate or exemplary behavior, organized into institutions. Rules are followed because they are seen as natural, rightful, expected, and legitimate. (Olsen & March, 2004, p. 2).

When applying these ideas to the ICC, the following hypothesis is formulated, stemming from the ethics of conviction.

H2: Limitations in the mandate of ICC investigations reflect a moral consideration.

## Research Design

This thesis aims to answer the question : To what extent is the International Criminal Court impartial in determining its investigations? As mentioned, the way the ICC justifies their choices is the main aspect to analyze here. Therefore, this section explains how the research was designed, by defining the concepts that are used and explaining the method of analysis and the case selection.

First, the concepts of this research should be explained in more detail. While the importance of impartiality has been emphasized in the introduction, it is important to clearly state what is meant here with impartiality. The Rome Statute of the ICC explicitly mentions that judges and the Prosecutor shall not participate in cases in which their impartiality ‘might reasonably be doubted on any ground’ (ICC, 1998, pp. 20-21). The trials themselves should also be ‘conducted in a fair and impartial manner’. (ICC, 1998, p. 31). Impartiality before the ICC thereby also means that ‘consistency and transparency’ are the chief focus, since they are both central to just-decision making (Kersten, 2018). This consistency would then in practice mean that cases with similar characteristics are treated in similar ways, which also means that for example political influences are dangerous for the legitimacy of the ICC. As Roach puts it, ‘the ICC has defended its impartiality by insisting that it remains an apolitical institution’ (2013, p. 507).

As already explained, this thesis focuses on cases where gravity and complementarity were contested. However, it is also important to explain in more detail what these criteria are and what role they play in the Court’s work. First, complementarity. The idea behind this principle is that the Court is one of ‘last resort’ and will complement, rather than supersede, national jurisdiction, thereby stepping in when those national courts are either ‘unable or unwilling’ to carry out their tasks (Lee, 2002, as cited in Carter, 2010). Second, gravity refers to the idea that the Court should only focus on the most serious crimes, ‘but also that the Court can manage its case load’ (Ochi, 2016). The focus in this research is on these two criteria, since their use is often contested and because the criteria help us assess whether the court is able to stay impartial.

The analysis is designed as follows. First, the legal and factual background of the decisions by the ICC are given. Second, a discourse analysis is done to find out how the ICC justifies these choices. The discourse analysis was chosen because it allows for an in-depth look at the arguments by the ICC, with the goal of establishing how impartial these decisions are. Discourse analyses are often used in political science, and it is an approach that

challenges the ‘realist notion that language is simply a neutral means of reflecting or describing the world’ and can be described as a ‘qualitative and interpretive method of analyzing texts’ (Gill, 2000, p. 172 ; Luo, 2019). The analysis is deductive, meaning that the coding scheme that is used (see figure 1) is based on the theoretical framework and thus includes the possible factors that guide the Court’s decisions. The data that will be analyzed is qualitative, existing out of primary sources by the ICC. This includes reports regarding the cases, statements by the Prosecutors and court documents that address concerns by victims.

Figure 1. Coding scheme for the discourse analysis

Category Number	Category theme	Category description	Example of discourse
1.	<i>Ethics of responsibility</i>	Discourse that refers to political considerations or practical considerations (such as the amount of resources or the likelihood of apprehending a suspect)	‘I am cognizant of <b>the limited resources</b> available to my Office’ (Khan, 2021).
2.	<i>Ethics of conviction</i>	Discourse that refers to moral considerations (such as the strict application of legal criteria to ensure impartiality)	‘a rigorous objective assessment of the applicable <b>legal criteria</b> ’ (Bensouda, 2020).

Case selection

For this thesis, the focus will be on the cases of Afghanistan and Iraq. The United States were left out of the preliminary examination in Afghanistan, whereby the International Criminal Court referred to the ‘gravity’ of the crimes committed by other actors in the conflict (Khan, 2021). In regards to the UK, the ICC prosecutor decided to stop the investigations, thereby referring to the idea of complementarity (Bensouda, 2020). These cases are selected because they are outliers in the universe of cases by the ICC. There have been 18 countries under investigation by the ICC, but what is important for this thesis is in which investigations the use of gravity and complementarity was contested. For example, the use of complementarity is contested in the case of the DRC (Labuda, 2017) or the use of gravity in the case of Kenya, due to the ‘relatively small scale of the violence’, when compared to other cases (Sriram & Brown, 2012, p. 222). These cases are important to look at, but for this investigation we will

focus on the contested use of gravity in the case of Afghanistan and on the use of complementarity in the case of Iraq. Scholars like Leisner (2022, p. 108) are mentioning that previous prosecutor Fatou Bensouda ‘provided much more information related to the gravity of the crimes committed by the United States armed forces and the CIA’, which leads to her stating that leaving the US out of the Afghanistan investigation could be described as being a politicized choice. In the case of the UK, stopping the investigation due to complementarity issues has also been contested, with accountability results being very low with only ‘very few successful prosecutions in domestic courts for war crimes in Iraq’ (Bergsmo & Stahn, 2018, p. 448). The focus on these specific contested cases is due to the power of these countries being investigated. When taking into consideration that the Court is reliant on the support of states and their resources, ‘those major powers that enjoy global reach and influence are particularly important’ (Bosco, 2014, p. 4). If the Court is truly aiming to deliver universal and impartial justice, the real test would be to also have those actors being investigated. They therefore form outliers in the sense that they are Great Powers and it is important to see what kind of justifications the ICC mentions in not investigating such actors.

## **Results and discussion**

This chapter will start by discussing the case of Iraq/UK. First, a legal and factual background of the ICC decisions will be given. Second, the actual justifications for this case are analyzed to see why the ICC has stopped investigating the United Kingdom. The same is then done for the case of Afghanistan/US, but here it is to see why the United States has been left out of the scope of the investigation. Finally the conclusion compares the justifications in the two cases and the extent of impartiality for both cases is discussed.

### *The Iraq/United Kingdom case*

The Iraq war started in 2003, with an armed conflict between a coalition led by the US and the UK and Iraqi armed forces, with the UK not withdrawing their troops until September 2007 (OTP, 2020, pp. 16-20). This means that the ICC focused their examination on ‘alleged crimes committed by United Kingdom nationals in the context of the Iraq conflict and occupation from 2003 to 2008, including murder, torture, and other forms of ill-treatment’ (ICC, n.d-a). While the examination had been terminated once before in 2006 and had been reopened again in 2014 due to new information, the International Criminal Court decided to close the preliminary examination again on the 9<sup>th</sup> of December 2020 (OTP, 2020, p. 9 ). This resulted in the UK no longer being investigated.

To see what factors played a role in the decision, two different texts were analyzed. First, and also the most important one is the lengthy ‘Situation in Iraq/UK - Final report’, published by the Office of the Prosecutor (2020) which explains in detail how the ICC arrived at the decision to stop the examination. The ICC first acknowledges that there is a reasonable basis to believe that British forces committed crimes that would fall under the jurisdiction of the ICC (p. 4). This means that the gravity threshold had been met, in terms of ‘scale, nature, manner of commission and impact’ (p. 55). Therefore, the decision to stop this investigation is justified by referring to another part of the admissibility regime, that of complementarity. This complementarity assessment had not been straightforward, and gave rise to ‘complex factual and legal assessments’ (p. 180). The importance of the idea of complementarity was stressed throughout the report, for example in the following statement:

As the Court has emphasized, the ICC is not a human rights body called upon to decide whether in domestic proceedings the requirements of human rights law or domestic law have been violated. Rather it is tasked with determining whether it should exercise its own competence in a criminal case, in place of the primary duty which belongs to a State. (OTP, 2020, pp. 7-8).

The importance of the admissibility regime was further emphasized when the OTP stated that the Prosecutor has a ‘persisting duty’, which is that he or she must be satisfied ‘that all of the factors relevant to the opening of an investigation, including admissibility are met’ (p. 183).

In justifying their choice to stop the investigation, the ICC then explains in detail why they are not taking over jurisdiction from the United Kingdom. They admit that the ‘initial measures taken by the British army to investigate and prosecute alleged crimes’ did not live up to the standards of the Statute ‘in terms of inaction and unwillingness to genuinely carry out the relevant investigations’ (p. 180). The OTP also acknowledges that the domestic process in the UK has been going on for more than ten years, yet has resulted in ‘not one single case being submitted for prosecution’ (p. 6). However, since the authorities in the United Kingdom did take subsequent steps that show action and genuineness, the Court has come to the following conclusion :

The Office recalls that, based on its evaluation of the totality of the information available, it cannot conclude that the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions (article 17(1)(a)) or that decisions not to prosecute in specific cases resulted from unwillingness genuinely to prosecute (article 17(1)(b)). (OTP, 2020, p. 183).

The second document that was analyzed is the press-statement by former prosecutor Fatou Bensouda (2020), ‘on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom’. This statement, just like the report above, showed that the Court aims to justify closing the investigation through legal criteria. Again here, the Court re-iterates that they ‘acknowledge the efforts made by the UK authorities, even if at a later stage’, which led to Bensouda stating that ‘I therefore determined that the only professionally appropriate decision at this stage is to close the preliminary examination’. However, the press statement does acknowledge that these justifications might not be agreed upon by everybody. First, she recognizes that some people doubt the domestic proceedings in the UK, with some observers claiming ‘that the underlying claims were vexatious, or conversely, that the UK process was not genuine’. She then explains that that is exactly why these complex issues resulted in the 184-page report. Later in her statement, she acknowledges the following : ‘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’.

Former prosecutor Bensouda closes off by again mentioning in the statement below that the final choice was made due to legal reasons, and not for example political reasons :

As a prosecuting office, our aim is to bring a measure of justice to the victims of atrocity crimes in strict conformity with our mandate, without fear or favour. That commitment and duty are always subject to the possibilities and limits set by the Court’s founding treaty, the Rome Statute, and a rigorous objective assessment of the applicable legal criteria. (Bensouda, 2020).

#### *The Afghanistan/United States case*

In Afghanistan, the ICC authorized investigations into Afghanistan in 2020. While the Afghan government requested a deferral in that same year, the Court was of the opinion that ‘Afghanistan is not presently carrying out genuine investigations’ (ICC, n.d-b), thereby declining the deferral request. The OTP requested a reauthorization of the investigations in Afghanistan in 2021, which was then approved by the Pre-Trial Chamber II. While the conflict started earlier, Afghanistan did not become a member of the ICC until 1 May 2003. That is why the ICC focuses on ‘the crimes alleged to have been committed on the territory of Afghanistan since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation in Afghanistan and were

committed on the territory of other States Parties to the Rome Statute since 1 July 2002' (ICC, n.d.-b). The scope of the original investigation in 2020 included actors as 'the United States, the former Afghan government and the Taliban' (Leisner, 2022, p. 93). However, the ICC decided in September 2021, to focus on crimes committed by the Taliban and the Islamic state, thereby deprioritizing all other actors involved. This resulted in the US not being investigated.

In this case, three relevant documents were analyzed. First, the statements by the Prosecutor Karim Khan will be analyzed. The ICC released two statements by Prosecutor Khan, one 'on the escalating violence in the Situation of Afghanistan (2021a), and one regarding the request for a re-authorization of the investigation (2021b).

First, Khan (2021a) expresses his worries about the situation in Afghanistan, by echoing 'the views expressed by the United Nations Security Council over reported incidents on the territory of Afghanistan'. In this statement, the idea of limiting the scope of the investigation seems to be absent, since the Prosecutor states the following : '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'.

In the second statement by Khan (2021b), the ICC requested re-authorization, stating that there were currently no genuine domestic proceedings in Afghanistan for the crimes that were committed. Like in the case of Iraq, the importance of this idea of complementarity was also emphasized. Khan remained 'mindful of the principle of complementarity' and 'willing to constructively engage with national authorities in accordance with the principle of complementarity'. In deciding to limit the scope of the investigation and to prioritize crimes by the Taliban and the Islamic State, the ICC justifies this by referring to the idea of gravity and the idea of resources, as can be seen in the statement below :

The gravity, scale and continuing nature of alleged crimes by the Taliban and the Islamic State, which include allegations of indiscriminate attacks on civilians, targeted extrajudicial executions, persecution of women and girls, crimes against children and other crimes affecting the civilian population at large, demand focus and proper resources from my Office, if we are to construct credible cases capable of being proved beyond reasonable doubt in the courtroom. (Khan, 2021b).

This shows again that the admissibility regime of complementarity and gravity are used to justify the choice. Another practical consideration besides resources can also be seen above, since the Prosecutor implies that the resources should be spent on convictions that have a chance of succeeding. The practical consideration of resources was also stressed once more, when Prosecutor Khan said ‘I am cognizant of the limited resources available to my Office relative to the scale and nature of crimes within the jurisdiction of the Court that are being or have been committed in various parts of the world’. There is however somewhat of a mixed message when it comes to resources as a justification, since Khan closes his statement by mentioning that ‘regardless of resources, all parties to any conflict, and all actors’ should be aware that there is no statute of limitations for the crimes that have been committed.

Like in the first statement, another reference is made to the UN SC. The ICC thus tries to support or strengthen their argument by sharing the views of this organ :

In making the determination to prioritize crimes by IS-K, as well as the Taliban, I recall the United Nations Security Council's recent condemnation of "the deplorable attacks of August 26, 2021, near Hamid Karzai International Airport in Kabul, Afghanistan, which were claimed by the Islamic State in Khorasan Province", and further note that the Council has, in multiple resolutions, deemed that the terrorist activities of the Islamic State constitute a global threat to international peace and security. (Khan, 2021b.)

The third text that was analyzed was a report by the Pre-Trial Chamber II (2022), which explains their decision to authorize the investigation request by the Prosecutor, according to article 18(2) of the Rome Statute (ICC, 1998, p. 11). Especially relevant here are the concerns by victims that are being addressed in this report.

The concerns that were shared are about the content of the decision itself, but also about how this message had been delivered to the aggrieved. First, the limiting of the scope of the investigation. Victims and their representatives see this as ‘the Prosecution overlooking crimes allegedly committed by others’, which then results in the ‘absence of a serious prospect of ensuring accountability at the domestic level for these alleged crimes, whether in Afghanistan or in any other State’ (PTC, 2022, p. 14). According to the victims, the large scale and gravity of the crimes should have led to the Prosecution also investigating them (referring to actors as the Afghan armed forces or the United States). Regarding the communication of the decision, victims expressed the following concern:

Some victims further submit that the Prosecution's Application does not contain any fact or circumstances that might justify or explain narrowing the scope of the investigation as authorized by the Appeals Chamber, nor does it specify why the Prosecution does not intend to pursue the investigation in its entirety. (PTC, 2022, p. 14).

The Chamber responded to both concerns, but not in a very detailed way. In relation to the scope of the investigation, they mentioned that 'the legal framework does not envisage judicial review of the Prosecution's conclusion by the Chamber' (p. 15). In explaining their examination of the authorization-request, the Chamber did stress the importance of the admissibility regime again, including the ideas of gravity and complementarity. When discussing the concern about the given information, the following was said by the PTC:

The Chamber observes that the Prosecution's practice of informing victims of ongoing investigative activities and strategies by way of public statements has not always been perceived as coherent or comprehensive, and appears to result in a degree of confusion and disappointment on the side of victims. (PTC, 2022, p. 15).

This led to them inviting the Prosecution to critically assess their communication strategy towards victims (p. 15). This finding relates back to the literature about the Court. As was mentioned in the introduction, the discretion of the Prosecutor can lead to a lack of transparency. Multiple authors emphasized this need for more transparency (Murphy, 2006 ; Sacouto & Cleary, 2008). It is therefore a step in the right direction of the Court to acknowledge this shortcoming. Unfortunately, the Office of the Prosecution has not responded to this, and has thus not further clarified their choice to limit the scope.

#### *The discourse in relation to the theory*

After having analyzed the justifications, it must now be established what this means in relation to the theoretical framework and the coding scheme.

In the case of Iraq, the justifications and the discourse fell mainly under the ethics of conviction. The discourse included many instances that referred to moral considerations, as the strict application of legal criteria to ensure impartiality. This is because their main justification is the idea of complementarity, where they concluded that the UK showed active and genuine domestic proceedings and that the ICC could then not take over jurisdiction.

The strict legal criteria and the importance of impartiality was emphasized throughout both

the report and the statement. This is visible in the discourse that has been described above, for example when the ICC stated they would rule without ‘fear or favour’ and that a rigorous objective assessment of legal criteria was of big importance (Bensouda, 2020). Political considerations that would signal an ethics of responsibility could only be found in the discourse when the ICC mentioned that their decision could be seen as an ‘endorsement of the UK’s approach’ but it responded to such claims by offering many technical reasons (Bensouda, 2021). Practical considerations, such as the amount of resources or the likelihood of apprehending a suspect, were not found in the discourse.

The case of Afghanistan shows a different and more varied discourse. An ethics of conviction can be found in the instances where the Court refers to the legal criteria of complementarity and gravity. Especially gravity was important here, since the Prosecutor justified prioritizing certain actors due to the gravity and ongoing nature of their crimes. It also stressed impartiality and the importance of the rule of law, when it mentioned that all parties should be aware that there is no statute of limitations for crimes that fall under the jurisdiction of the Court (Khan, 2021b). However, more practical and political considerations could also be found. For example, this thesis showed that the Court referred to resources twice as a reason for prioritizing certain actors (Khan, 2021b). Especially relevant is the fact that the United Nations Security Council was mentioned twice in the case of Afghanistan. The Council stressed that the crimes by the Taliban and the IS are global threats and it is true that these actors must be held accountable (Khan, 2021a ; Khan, 2021b). While it may not be an explicit acknowledgement of political pressures, it is definitely an odd statement. This is because it technically entails that the ICC aims to support their choice of not investigating the United States, by echoing the views of an organ that includes the United States as one of the permanent five members (UN, n-d). What must be taken into account here is that the US has had a ‘complicated and tense relationship’ with the Court, with the ICC facing ‘firm resistance’ from the US (Ochs, 2019, p. 89 ; Mayerfeld, 2003, p. 93). The US has thus shown resistance and has also been accused of crimes by the Court itself. As Leisner mentions the governments of both Afghanistan and the US have been accused of war crimes and former prosecutor Bensouda provided much information regarding the gravity of the crimes committed by these actors (2022, p. 108). This means that the US has a strong motive to have the Court prioritize other actors. This relationship takes place in a bigger framework where the United Nations SC has often been criticized for being politicized, especially in its relation to the Court. As Razavifard and Barati state, it seems ‘that the Security Council and the world's great powers at the head of it, considering their interests, can exert a political

influence on this judicial organization in various ways' (2023, p. 89). This makes references to the Council in the case of Afghanistan/US, a slightly awkward combination.

### *The extent of impartiality*

As the coding scheme and theoretical framework have laid out, discourse that showed moral considerations and strict legal criteria to ensure impartiality, fell under the ethics of conviction. This is mainly the case for the Iraq/UK discourse. The decision was justified by referring to the ideas of complementarity, and it was clearly stated that impartiality and objectivity were of importance. Due to the high extent of impartiality that this case showed, the second hypothesis is true for this case, which meant that limitations in the mandate of ICC investigations reflect a moral consideration. In the case of Afghanistan, there was discourse that fell under the ethics of conviction. These were the instances where the Court mentioned gravity and complementarity. There was however more discourse here that can be classified under the ethics of responsibility, where the discourse displayed both practical considerations (such as resources), but also political considerations (such as the UN SC views). This means that the answer to the research question is different for both cases. The case of Iraq tends to display a higher extent of impartiality. The case of Afghanistan also shows an extent of impartiality, but other factors that can be categorized under the ethics of responsibility also played a role. This means that both hypotheses can be seen as true for this case, which means that limitations in the mandate of ICC investigations reflected political, practical and moral considerations.

## **Conclusion**

The central question to this research paper has been : To what extent is the International Criminal Court impartial in determining its investigations? This question was part of a bigger puzzle, namely that of the ICC aiming to deliver impartial justice in a highly politicized world. In order to find an answer to this question, the theoretical distinction by Max Weber was used, with an ethics of conviction and an ethics of responsibility. Two hypotheses were then formulated, with H1 stating that limitations in the mandate of the ICC were due to practical and political considerations, while H2 stated that this was due to moral considerations. This was then formulated in a coding scheme and applied to the cases of Iraq/UK and Afghanistan/US, to find out what the justifications are for decisions by the ICC.

The answer to the research question can be summarized as the following. The discourse surrounding the case of Iraq displayed the highest extent of impartiality, with

justifications primarily falling under the ethics of conviction. This means that there were many instances where the court showed a strict adherence to the legal criteria, especially that of complementarity. The Court did address the criticism of endorsing the approach by the United Kingdom briefly, but the overall justifications were technical. With the justifications in the Afghanistan case, discourse fell under both the ethics of conviction and an ethics of responsibility. The Court pointed towards gravity and the lack of resources as reasons for limiting the scope of the investigation. It has been explained that some political influence could also be seen in the discourse, with the United Nations Security Council and their views appearing twice. The conclusion of this research is that the ICC displays a relatively high extent of impartiality, but that this impartiality did differ in both cases, with the Iraq/UK case showing more impartiality than in the case of Afghanistan/US.

Now that a summary of this research paper has been given, it is also important to mention its limitations and the suggestions for further research. The limitations for this research apply mainly to the method of analysis and the data. A discourse analysis is an interpretive method of looking at a text, which means that there is a risk of subjectivity, since ‘the interpretation of a text or conversation depends on the perspective of the analyst (Rashid, 2023). This subjectivity will always be present, but this thesis has aimed to limit the subjectivity of the interpretations by also engaging with the broader literature on this topic. Second, the amount of data of the discourse analysis can be seen as a limitation. The original idea was to conduct interviews with ICC personnel as well, since that would offer a more detailed look into the decisions they made. However, the ICC did not respond to this request, but such a way of data collection would have been very valuable. The research has tried to still remain as close to the source as possible to get the clearest view of their justifications, by only analyzing primary sources by the ICC itself. Further research could thus focus more on interviewing ICC personnel to have a more detailed assessment on the extent of impartiality. Another suggestion for further research is to investigate other cases. This thesis has explained why the focus was on Great Powers, but it would also be interesting to conduct similar research on a case where the country was not as politically powerful, to see if the discourse is different.

As has been explained in the introduction of this thesis, the gap in the literature was that it is not always clear why the ICC sometimes limits the scope of investigation. The theoretical implication of this thesis is therefore that it has made clear what the justifications are in the cases of Afghanistan and Iraq. It has also contributed to the literature about the lack of transparency by pointing out that this was also strongly the case in Afghanistan, which

impacts the victims negatively.

The importance of impartiality cannot be understated for a legal institution like the Court, especially because they are the biggest actor available to hold individuals accountable. Since there were some aspects found in the Afghanistan case that showed political considerations, this has implications for the consistency at the Court and therefore also their legitimacy. If the ICC wishes to fulfill their goal of putting 'an end to impunity' for the most serious crimes (ICC, 1998, p. 1), the ball is quite literally and figuratively in their Court.

## References

- Ambos, K. (2022). Ukraine and the Double Standards of the West. *Journal of International Criminal Justice*, 20(4), 875–892.
- Bensouda, F. (2020). Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom Image [Press Statement]. Consulted on March 31st, from <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-iraq/united>
- Bergsmo, M., & Stahn, C. (2018). *Quality Control in Preliminary Examination : Volume I*. Torkel Opsahl Academic Epublsher.
- Bosco, D. (2014). *Rough Justice : The International Criminal Court in a World of Power Politics*. Oxford University Press
- Carofiglio, D. (2015). To what Extent Have Politics Restricted the ICC's Effectiveness? *E-International Relations*. Consulted on May 3 2023, from <https://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/>
- Carter, L. (2010). The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem. *Santa Clara Journal of International Law*, 8, 165–198.
- deGuzman, M. (2012). Choosing to Prosecute: Expressive Selection at the International Criminal Court. *Michigan Journal of International Law*, 33(2), 265–320.
- Gill, R. (2000). Discourse Analysis. In P. Atkinson & M. Bauer (Eds.), *Qualitative Researching with Text, Image and Sound: A Practical Handbook*. SAGE Publications.
- International Criminal Court. (1998). Rome Statute of the International Criminal Court. In *International Criminal Court*.
- International Criminal Court. (2020). Understanding the International Criminal Court. In *International Criminal Court*.

International Criminal Court. (n.d.-a). *Iraq/UK*. International Criminal Court. Consulted on May 22nd 2023, from <https://www.icc-cpi.int/iraq>

International Criminal Court. (n.d.-b). *Afghanistan*. International Criminal Court. Consulted on May 22nd 2023, from <https://www.icc-cpi.int/afghanistan>

Kersten, M. (2018). *Reframing the ICC Selectivity Debate? : The Importance of Consistency and Transparency. Justice in Conflict*. Consulted on April 10th 2023, from <https://justiceinconflict.org/2018/04/24/reframing-the-icc-selectivity-debate-the-importance-of-consistency-and-transparency/>

Khan, K. (2021a). *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, on the escalating violence in the Situation in Afghanistan*. International Criminal Court. Consulted on May 21st 2023, from <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-escalating-violence-situation>

Khan, K. (2021b). *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 [Press statement]*. Consulted on March 31st, from <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>

Krasner, S. D. (2002). *Realist Views of International Law. Proceedings of the Annual Meeting (American Society of International Law)*, 96, 265–268.

Labuda, P. (2017). *Taking Complementarity Seriously: Why is the International Criminal Court Not Investigating Government Crimes in Congo? Opinio Juris*. Consulted on April 24th, from, <http://opiniojuris.org/2017/04/28/33093/>

Leisner, K. (2022). *Prioritizing the Taliban at the ICC : Is the Court Able to Curb Political Prosecutions? Maryland Journal of International Law*, 37(1), 93–121.

- Luo, A. (2022, December 05). Critical Discourse Analysis | Definition, Guide & Examples. Scribbr. Retrieved May 25, 2023, from <https://www.scribbr.com/methodology/discourse-analysis/>
- Mayerfeld, J. (2003). Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights. *Human Rights Quarterly*, 25(1), 93–129.
- Murphy, R. (2006). Gravity Issues and the International Criminal Court. *Criminal Law Forum*, 17(3), 281–316.
- Ochi, M. (2016). Gravity Treshold before the International Criminal Court : An Overview of the Court's Practice. *International Crimes Database*.
- Ochs, S. (2019). The United States, the International Criminal Court, and the Situation in Afghanistan. *Notre Dam Law Review Reflection*, 95(2), 89–100.
- Olsen, J., & March, J. (2004). The Logic of Appropriateness. *ARENA Working Papers*, 1–28.
- Pitty, R. (2006). "Political Constraints upon the International Criminal Court". In *The Challenge of Conflict: International Law Responds*, 347-365.
- Pre-Trial Chamber II. (2022). Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation. In *International Criminal Court*.
- Rashid, M. H. A. (2023, February 10). Approaches to Discourse Analysis | How to Do Discourse Analysis | Strengths and Weaknesses of Discourse Analysis | When to Use Discourse Analysis. Library & Information Management. Consulted on May 26th 2023, from <https://limbd.org/approaches-to-discourse-analysis-how-to-do-discourse-analysis-strengths-and-weaknesses-of-discourse-analysis-when-to-use-discourse-analysis/>
- Razavifard, B., & Barati, M. (2023). The Effect of the United Nations Security Council on the Politicization of the International Criminal Court. *International Law Review*, 40(69), 93-129.

- Roach, S. C. (2013). How Political Is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy. *Global Governance*, 19(4), 507–523.
- Rodriguez-Pareja, M., & Herencia-Carrasco, S. (2015). At the ICC, there is no deterrence without resources. openDemocracy. Consulted on March 2nd 2023, from <https://www.opendemocracy.net/en/openglobalrights-openpage/at-icc-there-is-no-deterrence->
- SáCouto, S., & Cleary, K. (2008). The Gravity Threshold of the International Criminal Court. *American Journal of International Law*, 23(5), 507–854.
- Sriram, C.L., & Brown, S. (2012). Kenya in the shadow of the ICC: Complementarity, gravity, and impact. *International Criminal Law Review*, 12, 219-244.
- United Nations. (n.d.). *Current Members | United Nations Security Council*. United Nations. Consulted on May 26th 2023, from <https://www.un.org/securitycouncil/content/current-members>
- Vasiliev, S. (2022). Watershed Moment or Same Old?: Ukraine and the Future of International Criminal Justice. *Journal of International Criminal Justice*, 20(4), 893–909.
- Vignoli, M. E. (2023). The Long – Yet Still Uneven – Arc of International Justice. *Opinio Juris*. Consulted on April 27th 2023, from <https://opiniojuris.org/2023/01/27/the-long-yet-still-uneven-arc-of-international-justice/>
- Weber, M. (2004). *The Vocation Lectures: Science As A Vocation, Politics As A Vocation* (D. Owen & T. Strong, Reds.). Internet Archive. Consulted on May 8th 2023, from [https://archive.org/stream/max\\_weber\\_the\\_vocation\\_lectures\\_science/Max%20Weber,%20David%20S.%20Owen,%20Tracy%20B.%20Strong,%20Rodney%20Livingstone-The%20Vocation%20Lectures\\_%20Science%20As%20a%20Vocation,%20Politics%20As%20a%20Vocation%20%282004%29\\_djvu.txt](https://archive.org/stream/max_weber_the_vocation_lectures_science/Max%20Weber,%20David%20S.%20Owen,%20Tracy%20B.%20Strong,%20Rodney%20Livingstone-The%20Vocation%20Lectures_%20Science%20As%20a%20Vocation,%20Politics%20As%20a%20Vocation%20%282004%29_djvu.txt)
- The Office of the Prosecutor. (2020). Situation in Iraq/UK - Final Report. In *International Criminal Court*.

The Office of the Prosecutor. (2013). Policy Paper on Preliminary Examinations. In *International Criminal Court*.