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Is the International Criminal Court Dying? An Examination of Symptoms

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ABSTRACT

The International Criminal Court (ICC) has recently been derided as a dead or dying institution. This Article briefly reviews some of the signs that the ICC may be waning in effectiveness and relevance. First, the ICC has struggled to produce results: the court has completed few cases, and fewer are making their way through the court. The ICC has a strictly confined jurisdiction that has limited the number of situations and cases brought before it. Second, there is a perception that the ICC is impotent. Long trials have resulted in delayed justice, and the court

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is powerless to act in notable acts of atrocity. Third, the ICC has become politicized through both the opposition of African states and the State of Palestine joining and referring the Israeli-Palestinian conflict to the court. These symptoms point to a court not in crisis but one that is suffering an extended decline to future irrelevance.

INTRODUCTION

In 2018, United States National Security Advisor John R. Bolton delivered a speech to the Federalist Society in which he made what he described as “a major announcement” on U.S. policy toward the ICC.¹ Bolton bluntly stated, “We will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC. We will let the ICC die on its own [T]he ICC is already dead to us.”² This was predictable bombast from Bolton, one of the court’s sharpest and most consistent critics³ since the negotiation of the court’s founding Rome Statute in 1998.⁴ In the months following Bolton’s speech, the Trump administration revoked ICC Prosecutor Fatou Bensouda’s entry visa,⁵ and in 2020, the administration placed economic sanctions on Bensouda and other ICC officials.⁶ Despite early speculation that the Biden administration would quickly lift these sanctions, the Biden administration has yet to do so. The Biden administration may be keeping the sanctions in place to secure leverage against the ICC as the

¹ John R. Bolton, Nat’l Sec. Advisor, Protecting American Constitutionalism and Sovereignty from International Threats, Speech to the Federalist Society for Law and Public Policy Studies, at 9:06 (Sept. 10, 2018), <https://fedsoc.org/events/national-security-advisor-john-r-bolton-address> [<https://perma.cc/8DEG-92UK>].

² *Id.*

³ See, e.g., John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America’s Perspective*, 41 VA. J. INT’L L. 186, 202 (2000) (suggesting that the United States’ approach to the ICC should be “[n]o financial support . . . no cooperation; and no further negotiations”).

⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁵ 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> [<https://perma.cc/6J66-G25E>].

⁶ Karen De Young & Carol Morello, *Trump Authorizes Sanctions Targeting International Criminal Court*, WASH. POST (June 11, 2020), https://www.washingtonpost.com/national-security/trump-authorizes-sanctions-targeting-international-criminal-court/2020/06/11/6130d78c-abf4-11ea-9063-e69bd6520940_story.html [<https://perma.cc/DQY2-7SSM>]; Matthew Lee, *New US Sanctions on International Tribunal Prosecutor, Aide*, ASSOCIATED PRESS (Sept. 2, 2020), <https://apnews.com/article/ec6fc680118ec01d01abe0173870e371> [<https://perma.cc/F2BN-MUPR>].

court proceeds with its investigation in Palestine.⁷ Even under the new presidential administration, the prospect of any U.S. and ICC cooperation looks dim to nonexistent.

But overlooking the biases of the messenger, we must ask whether Bolton is broadly correct. While it is undoubtedly premature to say that the ICC is dead, the court has the symptoms of a dying institution. As the ICC prepares to enter its twentieth year of operation, it is clear the court will die if it remains on its current trajectory. Although it is too early to mark the ICC as a failed experiment in international justice, the court has not lived up to the expectations that many supporters had expressed in 1998. While 123 countries have joined the ICC—a respectable membership for an institution of this age—the ICC has celebrated few successes. At the general debate during the Assembly of State Parties in December 2020, ICC member states were consistently positive about the past and recommitted themselves to the success of the ICC.⁸ However, it is difficult not to believe that, behind closed doors, member states are gravely worried about the court's future.

The purpose of this Article is to examine three symptoms of the court's ill health in an attempt to explain why the ICC is potentially on the road to obsolescence. Part I will examine the output of the court and will highlight the underwhelming results in terms of convictions, cases before the court, and situations before the court. Part II addresses the problem of the perceived impotence of the ICC that results from its

⁷ Julian Borger, *Criticism Builds over Biden's Failure to Lift Trump Sanctions on ICC Prosecutors*, GUARDIAN (Feb. 26, 2021, 9:52 AM), <https://www.theguardian.com/us-news/2021/feb/26/biden-trump-sanctions-icc-prosecutors-israel> [<https://perma.cc/679D-WBZ8>]. *But see, e.g.*, Ben Samuels, *Biden Administration Plans to Lift Trump Sanctions on ICC Officials, Report Says*, HAARETZ, (Mar. 31, 2021), <https://www.haaretz.com/us-news/.premium-biden-administration-to-lift-trump-sanctions-on-icc-officials-1.9672358> [<https://perma.cc/NM7C-JU8C>] (reporting that the Biden administration has planned to lift the sanctions). For a discussion of the ICC's actions in Palestine, see *infra* Section III.B.

⁸ *See, e.g.*, Matthew Neuhaus, Ambassador Austl., Statement by Australia to the 19th Session of the Assembly of States Parties to the International Criminal Court (Dec. 14, 2020), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/GD.AUST.14.12.pdf [<https://perma.cc/LD6R-2KUN>]; Konrad Marciniak, Dir. of Legal & Treaty Dep't, Ministry Foreign Affs. of Pol., Statement (Dec. 14, 2020), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/GD.POL.14.12.pdf [<https://perma.cc/YE97-DPNU>]; Irene F.M. Kasyanju, Ambassador Tanz., Remarks on Agenda Item 9 on the General Debate (Dec. 14, 2020), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/GD.TAN.14.12.pdf [<https://perma.cc/A9ZU-KMCR>]. All the 2020 debate statements of ICC States Parties are available at https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_19th_session.aspx [<https://perma.cc/67S9-ANPM>].

slow processes and its jurisdictional inability to act in well-known situations of atrocity. Part III discusses the politicization of the court that has resulted from both the African opposition to the ICC and Palestinian membership and involvement with the court. The cumulative effect of these symptoms leads to the conclusion that the ICC is on the verge of a serious health crisis.

I LACK OF RESULTS

Ultimately, two primary measures reflect the health of the ICC: first, the number of convictions secured, and second, the number of situations and cases brought before the court. On both counts, the ICC has struggled.

A. Convictions Secured

To date, the court has issued just five convictions within its core subject matter jurisdiction, which includes the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.⁹ Examining these five convictions reveals the limited scope of what the ICC has accomplished in nearly two decades of work. First, in 2012, Thomas Lubanga Dyilo was convicted of a war crime in the Democratic Republic of the Congo (DRC)¹⁰ and was sentenced to fourteen years' imprisonment.¹¹ Next, in 2014, Germain Katanga was convicted of crimes against humanity and war crimes in the DRC¹² and was sentenced

⁹ Rome Statute, *supra* note 4, art. 5. The court has also convicted five defendants who were charged with administration of justice offenses in *Prosecutor v. Bemba*, ICC-01/05-01/13, Judgment pursuant to Art. 74 of the Statute, 455–57 (Oct. 19, 2016), https://www.icc-cpi.int/CourtRecords/CR2018_01638.PDF [<https://perma.cc/S3PW-9NYG>].

¹⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment pursuant to Art. 74 of the Statute, ¶ 1358 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF [<https://perma.cc/JRP8-TUVD>]. Lubanga was convicted of the war crime of enlisting, conscripting, and using children under the age of fifteen years to actively participate in hostilities (child soldiers). *Id.*; see Rome Statute, *supra* note 4, art. 8(2)(b)(xxvi).

¹¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on Sentence pursuant to Art. 76 of the Statute, ¶ 107 (July 10, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_07409.PDF [<https://perma.cc/WF6J-TKQA>].

¹² *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to Art. 74 of the Statute, 658–60 (Mar. 7, 2014), <https://www.legal-tools.org/doc/f74b4f/pdf/> [<https://perma.cc/8PK9-LBLF>]. Katanga was convicted as an accessory to murder for a crime against humanity and for the war crimes of murder, attacking a civilian population, destruction of property, and pillaging. *Id.* at 658–59; see Rome Statute, *supra* note 4, arts. 7(1)(a), 8(2)(c)(1), (e)(i), (v), (xxii).

to twelve years' imprisonment.¹³ Then in 2016, Ahmad Al Faqi Al Mahdi was convicted of a war crime in Mali and sentenced to nine years' imprisonment.¹⁴ In 2019, Bosco Ntaganda was convicted of eighteen counts of war crimes and crimes against humanity in the DRC¹⁵ and was sentenced to thirty years' imprisonment.¹⁶ Finally, in 2021, Dominic Ongwen was convicted of sixty-one counts of crimes against humanity and war crimes in Uganda.¹⁷ The ICC has also tried

¹³ Prosecutor v. Katanga, ICC-01/04-01/07, Decision on Sentence pursuant to Art. 76 of the Statute, ¶ 170 (May 23, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_19319.PDF [<https://perma.cc/B5BE-GTRR>].

¹⁴ Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence, 49 (Sept. 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF [<https://perma.cc/P3NU-7JEC>]. Al Mahdi was convicted of the war crime of intentionally directing attacks against religious and historic buildings. *Id.* at 31–32; *see* Rome Statute, *supra* note 4, art. 8(2)(e)(iv).

¹⁵ Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment, 535–39 (July 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF [<https://perma.cc/27CE-2HXC>]. Ntaganda was convicted of the following crimes against humanity: murder, rape, sexual slavery, persecution, and forcible transfer and deportation. *Id.* Ntaganda was also convicted of the following war crimes: murder, intentionally directing attacks against civilians, rape, sexual slavery, pillaging, displacement of a civilian population, exploiting child soldiers, intentionally directing attacks against a health center, and destruction of the adversary's property. *Id.*; *see* Rome Statute, *supra* note 4, arts. 7(1)(a), (d), (g)–(h), 8(2)(c)(i), (e)(i), (iv)–(viii), (xii).

¹⁶ Prosecutor v. Ntaganda, ICC-01/04-02/06, Sentencing Judgment, 117 (Nov. 7, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06674.PDF [<https://perma.cc/844D-4QF7>].

¹⁷ Prosecutor v. Ongwen, ICC-02/04-01/15, Trial Judgment, ¶ 3116 (Feb. 4, 2021), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/04-01/15-1762-Red> [<https://perma.cc/FC9J-29MM>]. Ongwen was convicted of the following crimes against humanity: murder (four counts); attempted murder (three counts); torture (six counts); enslavement (six counts); persecution (four counts); forced marriage (two counts); rape (two counts); sexual slavery (two counts); and forced pregnancy (one count). *Id.* Ongwen was also convicted of the following war crimes: murder (four counts); attempted murder (three counts); attacking a civilian population (four counts); torture (six counts); pillaging (four counts); outrages upon personal dignity (two counts); destruction of the adversary's property (two counts); rape (two counts); sexual slavery (two counts); forced pregnancy (one count); and child soldiers (one count). *Id.*; Rome Statute, *supra* note 4, arts. 7(1)(a), (c), (f)–(h), (k), 8(2)(c)(i)–(ii), (e)(i), (v)–(vii), (xii). At the time of writing this Article, Ongwen had not been sentenced, and the guilty verdict was subject to appeal.

and acquitted two individuals of core crimes,¹⁸ and four cases are currently before the court in various stages of development.¹⁹

Seven completed cases and five convictions in nineteen years is not by any means a healthy output for a court of the ICC's stature and importance. Additionally, having only four pending cases has raised the specter of "empty courtrooms in the future"²⁰ that would be a sign of the court's irrelevance. The ICC has indicted eleven other individuals for core crimes, but those individuals are currently at large.²¹ In each instance, either the accused's whereabouts are unknown, or the accused's state of residence has refused to honor the ICC's warrant for their arrest.

B. Situations and Cases Before the Court

The prosecutor of the ICC can begin a case only if it relates to a situation previously brought within the ICC's jurisdiction. Therefore, the number of cases taken up by the court will generally be proportional to the number of situations brought before it, and the court can only

¹⁸ Prosecutor v. Bemba, ICC-01/05-01/08, Judgment pursuant to Art. 74 of the Statute (Mar. 21, 2016), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-3343>; Prosecutor v. Ngudjolo Chui, ICC-01/04-02/12, Judgment pursuant to Art. 74 of the Statute (Dec. 26, 2012), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/12-3-tENG>. Bemba was convicted at trial but was acquitted on appeal. Prosecutor v. Bemba, ICC-01/05-01/08 A, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF. He was later convicted of administration of justice offenses. Prosecutor v. Bemba, ICC-01/05-01/13, Judgment (Mar. 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_01638.PDF.

¹⁹ Prosecutor v. Abd-Al-Rahman, ICC-02/05-01/20 OA7, Judgment (June 2, 2021), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/20-415>; Prosecutor v. Al Hassan, ICC-01/12-01/18, Decision Establishing the Principles Applicable to Victims' Applications for Participation (May 24, 2018), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-37-tENG>; Prosecutor v. Said, ICC-01/14-01/21, Decision on Legal Representation of Victims and Related Matters (July 9, 2021), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/14-01/21-119>; Prosecutor v. Yekatom, ICC-01/14-01/18, Decision on the Yekatom Defense Motion for Disclosure of Screening Notes (Aug. 10, 2020), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/14-01/18-618>.

²⁰ Alex Whiting, *A Program for the Next ICC Prosecutor*, 52 CASE W. RES. J. INT'L L. 479, 481 (2020).

²¹ These individuals include Omar Hassan Ahmad Al Bashir, Mahmoud Mustafa Busayf Al-Werfalli, Abdallah Banda Abakaer Nourain, Saif Al-Islam Gaddafi, Simone Gbagbo, Ahmad Muhammad Harun, Abdel Raheem Muhammad Hussein, Al-Tuhamy Mohamed Khaled, Joseph Kony, Sylvestre Mudacumura, and Vincent Otti. For a list of defendants and their current status, see *Cases*, INT'L CRIM. CT., <https://www.icc-cpi.int/Pages/defendants-wip.aspx> (last visited Oct 13, 2021). Philip Kipkoech Bett and Walter Osapiri Barasa are at large and wanted by the ICC for offenses against the administration of justice as opposed to core ICC crimes.

partially control this. A situation can be brought to the court in three different ways. First, a situation can be brought through a state-party referral.²² A state that is a member of the court can refer a situation involving its territory or its nationals to the court.²³ Essentially, the state supplements its own criminal jurisdiction over the situation by giving the court concurrent jurisdiction. Second, a situation may be brought before the court using the prosecutor's proprio motu power of investigation over territory and nationals of ICC member states.²⁴ Unlike the other two methods, the proprio motu route requires the prosecutor to seek the approval of the court's Pre-Trial Chamber to bring the situation before the court. Approval is granted where there is "a reasonable basis to proceed with an investigation."²⁵ A non-state party can also accept the jurisdiction of the ICC, which can lead to a proprio motu case involving the non-state party's territory or nationals.²⁶ This is sometimes referred to as a "non-state-party referral" but is essentially an extension of the prosecutor's proprio motu powers. Lastly, the United Nations Security Council (UNSC) can refer a situation to the court.²⁷ Such a referral can be done irrespective of whether the state where the alleged crimes took place is an ICC member or whether the alleged perpetrators are nationals of a state party.²⁸ The Rome Statute gave the UNSC this power to preserve the UNSC's role as the premier international body tasked with taking action with respect to threats to or breaches of international peace and security.²⁹

1. State Referrals

Currently, the ICC has fourteen situations under its formal investigative jurisdiction. Seven of these have been referrals by state or non-state parties.³⁰ State-referral situations are the most common

²² Rome Statute, *supra* note 4, arts. 13(a), 14, 15 *bis*.

²³ *Id.* art. 12(2).

²⁴ *Id.* arts. 13(c), 15 *bis*.

²⁵ *Id.* art. 15(4).

²⁶ *Id.* art. 12(3).

²⁷ *Id.* arts. 13(b), 15 *ter*.

²⁸ *Id.* arts. 12(2), 13(b), 15 *ter*.

²⁹ See U.N. Charter art. 39.

³⁰ Referring states include Democratic Republic of the Congo (2004), Uganda (2004), Central African Republic (2004), Côte d'Ivoire (2011), Mali (2012), Central African Republic II (2014), and State of Palestine (2015/2018). For a list of situations and their

source of cases for the ICC because a state that has referred a situation is more likely to cooperate with the prosecutor in gathering evidence and detaining and turning suspects over to the court.³¹ Indeed, to date, all five core crime convictions at the ICC have come from state referrals. In a somewhat promising sign, the court received referrals from Bolivia³² and Venezuela³³ in 2020. Both situations are currently under preliminary examination and may result in the ICC opening formal investigations. Overall, however, the rate of state referrals has decreased. This is a troubling sign for the future docket of the court.³⁴

2. *Proprio Motu Situations*

Five situations have come before the court as a result of the prosecutor's *proprio motu* power of investigation.³⁵ In general, these types of situations are less likely to result in actual cases before the court because states in such circumstances are generally resistant to ICC interference. The history of the situation in Kenya, which in 2010 became the first situation opened via the *proprio motu* power, has proven to be a stark indication of the limits of the ICC's power.³⁶ In

origins, see *Situations Under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situation.aspx> (last visited Dec. 3, 2021).

³¹ Alex Whiting, *Investigations and Institutional Imperatives at the International Criminal Court*, in *THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS* 128, 131 (Martha Minow et al. eds., 2015) (“[I]nternational criminal investigators rely almost entirely on cooperation from states to conduct investigations and effectuate arrests.”).

³² Press Release, Office Prosecutor, Int'l Crim. Ct., Statement of the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, on the Referral by Bolivia Regarding the Situation in its Own Territory (Sept. 9, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=200909-otp-statement-bolivia-referral> [<https://perma.cc/HR9R-KEMF>].

³³ Press Release, Office Prosecutor, Int'l Crim. Ct., Statement of the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, on the Referral by Venezuela Regarding the Situation in its Own Territory (Feb. 17, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=200217-otp-statement-venezuela> [<https://perma.cc/4YHX-WHDT>].

³⁴ State referrals were also lodged by Comoros in 2013 and Gabon in 2016, but in both cases the prosecutor determined that the legal requirements for opening an investigation had not been met. Off. of the Prosecutor, Int'l Crim. Ct., *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Rep.*, ICC-01/13-6-AnxA (Nov. 6, 2014); Off. of the Prosecutor, Int'l Crim. Ct., *Final Decision of the Prosecutor Concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA), Dated 6 November 2014, as Revised and Refiled in Accordance with the Pre-Trial Chamber’s Request of 15 November 2018 and the Appeals Chamber’s Judgment of 2 September 2019*, ICC-01/13-99-Anx1 (Dec. 2, 2019); Off. of the Prosecutor, Int'l Crim. Ct., *Situation in the Gabonese Republic: Prosecutor’s Notice of her Decision Under Article 15(6) of the Statute*, ICC-01/16-5 (Sept. 11, 2019).

³⁵ Kenya (2010), Georgia (2016), Burundi (2017), Bangladesh/Myanmar (2019), and Afghanistan (2020). *Situations Under Investigation*, *supra* note 30.

³⁶ See generally Westen K. Shilaho, *The International Criminal Court (ICC), Impunity, and the Elusive Justice in Kenya*, in *POLITICAL POWER AND TRIBALISM IN KENYA* 143

2012, the ICC confirmed charges against four defendants related to postelection violence in 2007 and 2008.³⁷ The ICC had jurisdiction over the defendants because the alleged crimes took place in Kenya, which ratified the Rome Statute in 2005. In March 2013, two of the accused, Uhuru Kenyatta and William Ruto, were elected president and vice-president of Kenya respectively. During the election campaign, Kenyatta and Ruto used their ICC indictments to their advantage by arguing that the ICC was a neocolonial institution dominated by Western powers.³⁸ Upon their election, the Kenyan government immediately stopped cooperating with the ICC by withholding evidence and witnesses.³⁹ Consequently, the cases collapsed, and the charges against the four accused were eventually withdrawn or vacated.⁴⁰

However, the debacle of the Kenya situation has not deterred the Office of the Prosecutor from commencing proprio motu investigations. It has opened four cases since 2016,⁴¹ but it is unclear if the states involved will cooperate in gathering evidence. If they do not cooperate, it is likely that no cases will result from these investigations.

(2018); Daniel M. Mburu, *The Lost Kenyan Duel: The Role of Politics in the Collapse of the International Criminal Court Cases Against Ruto and Kenyatta*, 18 INT'L CRIM L. REV. 1015 (2018).

³⁷ Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-2027-Red>; Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of the Rome Statute (Jan. 29, 2012), <https://www.icc-cpi.int/pages/record.aspx?uri=1314543>.

³⁸ Mburu, *supra* note 36, at 1031.

³⁹ *Id.* at 1033–36.

⁴⁰ Prosecutor v. Muthaura, ICC-01/09-02/11-687, Prosecution Notification of Withdrawal of the Charges Against Francis Kirimi Muthaura (Mar. 11, 2013), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-687>; Prosecutor v. Muthaura, ICC-01/09-02/11-696, Decision on the Withdrawal of Charges Against Mr. Muthaura (Mar. 18, 2013), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-696>; Prosecutor v. Kenyatta, ICC-01/09-02/11-983, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta (Dec. 5, 2014), <https://www.icc-cpi.int/pages/record.aspx?uri=1879204>; Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Decision on the Withdrawal of Charges Against Mr. Kenyatta (Mar. 13, 2015), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-1005>; Prosecutor v. Ruto, ICC-01/09-01/11-2027-Red-Corr, Decision on Defence Applications for Judgments of Acquittal (Apr. 5, 2016), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-2027-Red>.

⁴¹ *Situations Under Investigation*, *supra* note 30.

3. UNSC Referrals

The UNSC has referred two situations to the ICC: Darfur (Sudan) and Libya. The Darfur situation was referred in 2005,⁴² and the Libya situation was referred in 2011.⁴³ A decade without a UNSC referral illustrates the lack of political will from permanent members China, Russia, and the United States to empower the court to act. Not surprisingly, given Sudan's and Libya's resistance to ICC processes, the two situations that have been referred by the UNSC are not producing cases for trial. In the Libya situation, no suspects have been turned over to the ICC. In the Darfur situation, Luis Moreno-Ocampo, the first prosecutor of the ICC, caused a stir in the international community in 2010 when the Pre-Trial Chamber granted his request for a warrant of arrest to be issued for Sudanese President Omar Al Bashir on, *inter alia*, three counts of genocide.⁴⁴ This was significant on two fronts: it was the first genocide indictment by the ICC, and Al Bashir was the first head of state to be indicted. However, at least thirty-three states that Al Bashir visited as president, including ICC member states South Africa, Jordan, and Uganda, have ignored the warrant for his arrest.⁴⁵ The Sudanese regime that succeeded Al Bashir initially agreed that Al Bashir should be turned over to the ICC.⁴⁶ However, the government has more recently suggested that he could be tried by a "hybrid court" in Sudan,⁴⁷ a move that would preclude ICC prosecution due to the principle of complementarity, whereby any case becomes inadmissible before the ICC if it is "investigated or prosecuted by a State which has jurisdiction over it."⁴⁸ Apart from Al Bashir, one

⁴² S.C. Res. 1593 (Mar. 31, 2005).

⁴³ S.C. Res. 1970 (Feb. 26, 2011).

⁴⁴ Prosecutor v. Al Bashir, ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest, 28 (July 12, 2010), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-94>; Press Release, Int'l Crim. Ct., Pre-Trial Chamber I Issues a Second Warrant of Arrest Against Omar Al Bashir for Counts of Genocide, ICC-CPI-20100712-PR557 (July 12, 2010).

⁴⁵ Tom White, *States 'Failing to Seize Sudan's Dictator Despite Genocide Charge'*, GUARDIAN (Oct. 15, 2020, 9:22 AM), <https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant> [<https://perma.cc/DWY5-3DLT>].

⁴⁶ Jason Burke & Zeinab Mohammed Salih, *Sudan Signals It May Send Former Dictator Omar al-Bashir to ICC*, GUARDIAN (Feb. 11, 2020, 1:00 PM), <https://www.theguardian.com/world/2020/feb/11/sudan-says-it-will-send-former-dictator-omar-al-bashir-to-icc> [<https://perma.cc/RG2H-N5QW>].

⁴⁷ *Omar Bashir: ICC Delegation Begins Talks in Sudan Over Former Leader*, BBC NEWS (Oct. 17, 2020), <https://www.bbc.com/news/world-africa-54548629> [<https://perma.cc/E9TJ-MB2W>].

⁴⁸ Rome Statute, *supra* note 4, art. 17(1)(a).

Sudanese case has been dropped due to lack of evidence,⁴⁹ and another Sudanese suspect, who was originally cooperative and who appeared before the ICC, is now a fugitive.⁵⁰

4. The Role of Complementarity

The principle of complementarity is woven into the Rome Statute. Complementarity means that states with jurisdiction over offenses have the primary responsibility to investigate and try them,⁵¹ demonstrating that the ICC is truly a court of last resort. A case is admissible before the court only if the state with jurisdiction is “unwilling or unable genuinely to carry out the investigation or prosecution.”⁵² Even if a state genuinely investigates but chooses not to prosecute, the case is inadmissible before the ICC.⁵³ The principle of complementarity applies to all cases, regardless of the route the situation took to fall within the jurisdiction of the court. Less than one year into the court’s existence, Moreno-Ocampo suggested that an ICC with few cases could actually be a sign of success: “[C]omplementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”⁵⁴

Unfortunately, there are few signs that states are domestically investigating and prosecuting ICC crimes. Of the five situations where the Office of the Prosecutor has conducted a preliminary examination but refused to open a formal investigation,⁵⁵ complementarity has

⁴⁹ See Prosecutor v. Abu Garda, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges (Feb. 8, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_00753.pdf.

⁵⁰ Press Release, Int’l Crim. Ct., ICC Trial Chamber IV Issues Arrest Warrant Against Abdallah Banda Abakaer Nourain, ICC-CPI-20140911-PR1039 (Sept. 11, 2014).

⁵¹ See Rome Statute, *supra* note 4, pmbl. para. 6 (“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .”), art. 1 (“[The court] shall be complementary to national criminal jurisdictions.”).

⁵² *Id.* art. 17(1)(a).

⁵³ *Id.* art. 17(1)(b).

⁵⁴ Luis Moreno-Ocampo, Chief Prosecutor, Int’l Crim. Ct., Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), https://www.icc-cpi.int/nr/rdonlyres/d7572226-264a-4b6b-85e3-2673648b4896/143585/030616_moreno_ocampo_english.pdf.

⁵⁵ Honduras; Republic of Korea; Registered Vessels of Comoros, Greece, and Cambodia; Iraq/UK; and Gabon. See *Preliminary Examinations*, INT’L CRIM. CT., <https://www.icc-cpi.int/pages/pe.aspx> (last visited Oct. 13, 2021).

affected only one decision.⁵⁶ Complementarity was cited in the situation in Iraq involving actions of British nationals. In refusing to open a formal investigation, the Office of the Prosecutor stated that 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)).”⁵⁷

Further, most of the situations brought before the court in the past five years have been initiated by the prosecutor’s *proprio motu* power. If states were investigating and prosecuting crimes within their jurisdictions, there would be little need for the *proprio motu* power. If it is not the principle of complementarity that is preventing cases from being heard by the ICC, there is a deeper problem.

5. *Prosecutorial Strategies*

The workload prospects for the ICC look grim. The court has concluded few cases, and even fewer are currently working their way to trial. During his tenure, Moreno-Ocampo was criticized for not supporting his aggressive prosecutorial strategy with sufficient investigations.⁵⁸ Moreno-Ocampo’s successor, Bensouda, adopted the position that investigations would be in-depth and open-ended, with cases brought before the court only when they are “as trial ready as possible.”⁵⁹ However, this approach has perhaps resulted in the balance being tipped too far in the opposite direction because the Office of the Prosecutor was unable to meet its own standard in all but a handful of instances. Bensouda acknowledged at the beginning of her term that her approach would mean that the ICC “will only do a few cases.”⁶⁰ The consequences of this approach have led to the court’s light caseload. Therefore, one observer noted that “[b]y far, the most important objective of the next Prosecutor should be to bring more

⁵⁶ This assertion is based on my reading of the ICC Office of the Prosecutor documents regarding the five situations in question.

⁵⁷ Off. of the Prosecutor, Int’l Crim. Ct., *Situation in Iraq/UK Final Rep.*, ¶ 502 (Dec. 9, 2020), <https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>.

⁵⁸ See, e.g., Christian M. De Vos, *Investigating from Afar: The ICC’s Evidence Problem*, 26 LEIDEN J. INT’L L. 1009, 1015 (2013) (“One former official who led the Court’s investigations in Uganda made clear that the former Prosecutor routinely undervalued the investigations unit, with too little time given to conduct thorough investigations; another lamented the ‘long history of investigative mismanagement.’” (footnote omitted)).

⁵⁹ Off. of the Prosecutor, Int’l Crim. Ct., *Strategic Plan June 2012–2015*, 6 (Oct. 11, 2013), <https://www.legal-tools.org/doc/954beb/pdf>.

⁶⁰ Fatou Bensouda, *Looking Back, Looking Ahead – Reflections from the Office of the Prosecutor of the ICC*, 11 WASH. U. GLOB. STUD. L. REV. 437, 442 (2012).

cases. Many more cases.”⁶¹ If the next prosecutor is not successful in doing so, the ICC may well fade into virtual irrelevance.

II PERCEIVED IMPOTENCE

The perceived impotence of the ICC has also led to a loss of confidence in the institution and its ability to secure justice. This apparent impotence results from both the time it takes to prosecute a case and the court’s impotence in highly publicized situations of atrocity.

A. Delay

The first way that the ICC appears impotent is in the court’s inability to provide justice without inordinate delay. To date, ICC trials have been unnecessarily long, taking years rather than months. For instance, Thomas Lubanga Dyilo was arrested in October 2007 but was not sentenced until July 2012; his appeal was not resolved until December 2014, more than seven years after his arrest.⁶² Similarly, Jean-Pierre Bemba Gombo was transferred to The Hague for trial in July 2008, but the court did not issue a final judgment on his case until June 2018.⁶³

However, the Rome Statute guarantees defendants the right “[t]o be tried without undue delay.”⁶⁴ Identical provisions were found in the Statute of the International Criminal Tribunal for Rwanda (ICTR)⁶⁵ and the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY),⁶⁶ the jurisprudential forerunners of the ICC. In both tribunals, some defendants argued that the long nature of proceedings had violated this right,⁶⁷ but the general approach of the judicial

⁶¹ Whiting, *supra* note 20, at 486. The next prosecutor, Karim Khan, began his nine-year tenure in June 2021. *Id.*

⁶² Lubanga, ICC-01/04-01/06.

⁶³ Bemba, ICC-01/05-01/08.

⁶⁴ Rome Statute, *supra* note 4, art. 67(1)(c).

⁶⁵ S.C. Res. 955, annex, Statute of the International Criminal Tribunal for Rwanda, art. 20(4)(c) (Nov. 8, 1994).

⁶⁶ S.C. Res. 827, annex, Statute of the International Criminal Tribunal for the former Yugoslavia, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, art. 21(4)(c) (May 25, 1993).

⁶⁷ *E.g.*, Prosecutor v. Bizimungu, Case No. ICTR-99-50-I, Prosper Mugiraneza’s Motion to Dismiss the Indictment for Violation of Article 20(c)(4) of the Statute, Demand for Speedy Trial and for Appropriate Relief (July 17, 2003); Prosecutor v. Šešelj, Case No. IT-03-67, Request of the Accused for Trial Chamber II to Issue an Order for the Trial to

decisions has been that “*unexplained* delays can result in findings of speedy trial violations while delays with reasonable explanations likely will not.”⁶⁸ For instance, in 2018, the Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (the completion mechanism for the ICTR and ICTY) held that a twelve-year period of incarceration prior to trial judgment did not constitute prejudice per se that would violate a defendant’s right to be tried without undue delay.⁶⁹

But it would be unfair to ascribe the length of time between a defendant’s arrest and a final disposition in his case to unreasonable explanations. International criminal trials are complex, and the ICC’s processes as set out in the Rome Statute are notoriously labyrinthine. In the ten-year *Bemba* case, over 2,600 case records amounting to tens of thousands of pages were produced.⁷⁰ The mere fact that a case is complicated does not warrant a finding that the right to justice has been unduly delayed. Nevertheless, the perception remains that the ICC is impotently slow—perhaps too slow—for true justice to be realized.

B. Powerlessness over Well-Known Atrocities

A second perception of impotence lies in the awareness that the ICC is powerless to act in well-known situations of atrocity, which results from the ICC’s restrictive jurisdictional requirements. The ICC’s jurisdiction is not universal but is strictly limited by the provisions of the Rome Statute. Barring a UNSC referral, the court has jurisdiction only over acts committed in the territory of a state party or by a national of a state party.⁷¹ For instance, the repeated use of chemical weapons against civilians in the Syrian civil war would clearly fit the subject matter jurisdiction of the Rome Statute.⁷² Such repeated use has been attested by the periodic reports of the Organization for the Prohibition of Chemical Weapons–United Nations

Commence by 24 February 2006 or an Order to Abolish Detention, Dismiss the Indictment and Release Dr. Vojislav Šešelj (Int’l Crim. Trib. for the Former Yugoslavia Nov. 7, 2005).

⁶⁸ Cynthia Cline, *Trial Without Undue Delay: A Promise Unfulfilled in International Criminal Courts*, 8 BRAZ. J. PUB. POL’Y 55, 71 (2018).

⁶⁹ Prosecutor v. Šešelj, Case No. MICT-16-99, Judgment, ¶ 42 (Apr. 11, 2018).

⁷⁰ The trial judgment alone is 364 pages. Bemba, ICC-01/05-01/08. Even more substantial, the trial judgment in the *Ongwen* case is 1,077 pages. Ongwen, ICC-02/04-01/15.

⁷¹ Rome Statute, *supra* note 4, art. 12(2).

⁷² See U.N. Secretary-General, *Seventh Report of the Organization for the Prohibition of Chemical Weapons–United Nations Joint Investigative Mechanism*, U.N. Doc. S/2017/904 (Oct. 26, 2017).

Joint Investigative Mechanism.⁷³ However, because Syria is not a member state of the ICC, the court is powerless to assume jurisdiction over the territory of Syria or Syrian nationals.

In order to give the court jurisdiction over the atrocities in Syria, the UNSC could refer the situation to the court. A UNSC referral can extend the jurisdiction of the court to any situation it chooses.⁷⁴ But in 2014, Russia and China vetoed a proposed UNSC resolution to refer the situation in Syria to the ICC.⁷⁵ It is thought that any further UNSC referral attempts would meet the same fate,⁷⁶ primarily because Russia has vetoed fifteen other proposed UNSC resolutions involving Syria,⁷⁷ none of which mentioned the ICC at all.⁷⁸ Due to the complex Syrian civil war and the prominence of the atrocities committed there, Syria has become “the ICC’s *bête noire*,”⁷⁹ a symbol of its impotence in the face of atrocity.

The ICC has faced similar accusations of impotence related to the Burmese government’s genocidal persecution of the Rohingya in Myanmar.⁸⁰ Like Syria, Myanmar is not a party to the Rome Statute, so the ICC has no jurisdiction over the country or its nationals. However, the neighboring state of Bangladesh is a state party, and the Burmese government has driven many of the Rohingya from their homes in Myanmar across the border to Bangladesh. In 2018, Bensouda asked to

⁷³ See *id.* for the most recent report. Russia vetoed the renewal of the mandate of the Joint Investigative Mechanism in November 2017. See U.N. Doc. S/2017/970; U.N. SCOR, 72nd Sess., 8107 mtg., U.N. Doc. S/PV.8107 (Nov. 17, 2017).

⁷⁴ Rome Statute, *supra* note 4, art. 13(b).

⁷⁵ U.N. Doc. S/2014/348; U.N. SCOR, 69th Sess., 7180 mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014).

⁷⁶ See, e.g., Edith M. Lederer, *UN Chief Calls for Syria Referral to International Court*, ASSOCIATED PRESS (Jan. 26, 2018), <https://apnews.com/article/24e1d609e7944eeba37a17f1b7abb0af> [<https://perma.cc/WXR4-B9CN>].

⁷⁷ Edith M. Lederer, *UN Approves Aid to Syria’s Rebel Area Through 1 Crossing*, ASSOCIATED PRESS (July 11, 2020), <https://apnews.com/article/819e448a1cd3a48b221d1b5e2638c4cb> [<https://perma.cc/9DDM-8VJT>].

⁷⁸ This assertion is based on my reading of the draft Security Council resolutions in question.

⁷⁹ Matt Killingsworth, *Justice, Syria and the International Criminal Court*, AUSTRALIAN OUTLOOK, (Dec. 24, 2019), <https://www.internationalaffairs.org.au/australianoutlook/justice-syria-international-criminal-court> [<https://perma.cc/UE4P-A6VB>].

⁸⁰ See, e.g., Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar’s Rohingya*, 23 PAC. RIM L. & POL’Y J. 683, 686 (2014); Alexa Levy, *Rohingya in Myanmar: The United Nations’ Failure to Enforce Violations of Crimes Against Humanity and Genocide*, 51 GEO. WASH. INT’L L. REV. 321, 322 (2019); Michael A. Becker, *The Plight of the Rohingya: Genocide Allegations and Provisional Measures in The Gambia v Myanmar at the International Court of Justice*, 21 MELB. J. INT’L L. 428, 430–32 (2020).

exercise jurisdiction over the coercive acts that led to deportations on the grounds that “an essential legal element of the crime—crossing an international border—occurred on the territory of a State which *is* a party to the Rome Statute (Bangladesh).”⁸¹ The Pre-Trial Chamber accepted this approach and therefore agreed that “the Court has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.”⁸² The court subsequently granted Bensouda’s *proprio motu* request to open a formal investigation into the situation.⁸³ Thus, through creative lawyering, the prosecutor managed to overcome perceptions that the court was impotent to act in a situation of mass atrocity. However, the Rohingya case is an outlier. In addition to Syria, the ICC clearly has no jurisdiction to act in the prosecution of alleged crimes that have recently taken place in the non-ICC states of South Sudan,⁸⁴ Yemen,⁸⁵ China,⁸⁶ and Ethiopia.⁸⁷ As the number of atrocities grow and the work of the ICC stagnates, the perception of impotence harms the viability of the court.

III POLITICIZATION OF THE COURT

The ICC is undoubtedly a political institution, for it was established via a political process of negotiating states and is now governed by the Assembly of States Parties to the Rome Statute. But when critics speak of “politicization” of the court, they “mean something different and less

⁸¹ Off. of the Prosecutor, Int’l Crim. Ct., *Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, ICC-RoC46(3)-01/18-1, ¶ 2 (Apr. 9, 2018) (emphasis in original).

⁸² Int’l Crim. Ct., *Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,”* ICC-RoC46(3)-01/18-37, ¶ 73 (Sept. 6, 2018).

⁸³ Int’l Crim. Ct., *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-27 (Nov. 14, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF.

⁸⁴ CLÉMENCE PINAUD, *WAR AND GENOCIDE IN SOUTH SUDAN* 23–24 (2021).

⁸⁵ Waseem Ahmad Qureshi, *The Crisis in Yemen: Armed Conflict and International Law*, 45 N.C. J. INT’L L. 227, 258–60 (2020).

⁸⁶ Joseph E. Fallon, *China’s Crime Against Uyghurs Is a Form of Genocide*, 18 *FOURTH WORLD J.* 76, 81–82 (2020).

⁸⁷ Ethiopian Hum. Rts. Comm’n, *Rapid Investigation into Grave Human Rights Violation in Maikadra Preliminary Findings*, at 3 (Nov. 24, 2020), <https://eritreahub.org/wp-content/uploads/2020/11/Maikadra-Preliminary-Findings-English-Final.pdf>.

innocuous”;⁸⁸ they mean that the court is being selfishly used in the pursuit of state or individual interests. The ICC is suffering from a crisis of politicization, but such politicization has not emerged in the way that most observers feared. Politicization has emerged because of the court’s alleged anti-African bias and Palestine’s involvement with the court.

A. Alleged Anti-African Bias

The concern that an international criminal court would become politicized predates the establishment of the ICC. Early fears centered on the potential politicization of a prosecutor who was independent of state or UNSC control.⁸⁹ Consequently, the earliest draft of the Rome Statute did not include the prosecutor’s proprio motu power to open an investigation.⁹⁰ However, during the negotiation of the Rome Statute, a majority of states agreed that the prosecutor should have the proprio motu power,⁹¹ and it was included in the final statute.⁹² Early American opposition to the Rome Statute and the ICC included the concern that an independent ICC prosecutor would be unaccountable and therefore overly politicized.⁹³

In 2010, the prosecutor used the proprio motu power for the first time to open the situation in Kenya, and this action immediately magnified claims that the ICC and the prosecutor were acting under the influence of politically motivated anti-Africanism.⁹⁴ Beginning in 2009 and following the indictment of Sudanese president Al Bashir, the

⁸⁸ Gerry Simpson, *Politics, Sovereignty, Remembrance*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 47, 51 (Dominic McGoldrick et al. eds., 2004).

⁸⁹ Silvia A. Fernández de Gurmendi, *The Role of the International Prosecutor*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 175, 175–76 (Roy S. Lee ed., 1999).

⁹⁰ Draft Statute for an International Criminal Court, in *Report of the International Law Commission on the Work of its Forty-sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 43, U.N. Doc. A/49/10 (1994).

⁹¹ Fernández de Gurmendi, *supra* note 89, at 176.

⁹² Rome Statute, *supra* note 4, art. 15(1).

⁹³ See, e.g., Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 95 (2003); Bolton, *supra* note 3, at 194–95; David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 19 (1999).

⁹⁴ See, e.g., Jody Clarke, *Kenyan MPs Vote to Cut Ties with International Court*, IRISH TIMES (Dec. 24, 2010), <https://www.irishtimes.com/news/kenyan-mps-vote-to-cut-ties-with-international-court-1.689160> [<https://perma.cc/8MPC-S63G>]. For a retrospective discussion of this, see Geoff Dancy et al., *What Determines Perceptions of Bias Toward the International Criminal Court? Evidence from Kenya*, 64 J. CONFLICT RESOL. 1443 (2020).

“narrative of the court’s anti-African bias began to take hold among African leaders.”⁹⁵ The African Union (AU) objected to the indictment of Al Bashir by issuing a proclamation that AU member states were not to cooperate in the arrest of the Sudanese president.⁹⁶ During an extraordinary AU session in October 2013, the AU decried the “politicization and misuse of indictments against African leaders” and resolved that African heads of state should not appear before the ICC during their terms in office.⁹⁷ Finally, in 2016, South Africa,⁹⁸ Burundi,⁹⁹ and The Gambia¹⁰⁰ notified the United Nations that they were withdrawing as states parties to the Rome Statute. The Gambia¹⁰¹ and South Africa¹⁰² later retracted their withdrawals in 2017, but Burundi’s withdrawal took effect that same year and it became the first country to leave the ICC.

The nature of the situations and cases before the ICC has led to the perception that the court is inordinately focusing on African problems. The first nine situations brought before the ICC were from Africa,¹⁰³ and to date all forty-six of the individuals indicted by the court have

⁹⁵ Victor Peskin, *Things Fall Apart: Battles of Legitimation and the Politics of Noncompliance and African Sovereignty from the Rwanda Tribunal to the ICC*, in *THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS* 401, 416 (Nobuo Hayashi & Cecilia M. Bailliet eds., 2017).

⁹⁶ A.U., *Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, ¶ 10, A.U. Doc. Assembly/AU/13(XIII) (July 3, 2009).

⁹⁷ A.U., *Decision on Africa’s Relationship with the International Criminal Court (ICC), Extraordinary Session of the Assembly of the African Union*, ¶ 4, A.U. Doc. Ext/Assembly/AU/Dec.1 (Oct. 12, 2013).

⁹⁸ Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, U.N. Doc. C.N.786.2016.TREATIES-XVIII.10 (Oct. 19, 2016).

⁹⁹ Burundi: Withdrawal, U.N. Doc. C.N.805.2016.TREATIES-XVIII.10 (Oct. 27, 2016).

¹⁰⁰ Gambia: Withdrawal, U.N. Doc. C.N.862.2016.TREATIES-XVIII.10 (Nov. 10, 2016).

¹⁰¹ Gambia: Withdrawal of Notification of Withdrawal, U.N. Doc. C.N.62.2017.TREATIES-XVIII.10 (Feb. 10, 2017). Gambia’s retraction of its withdrawal occurred after the election of a new president. Press Release, Assembly of States Parties to the Rome Statute of the Int’l Crim. Ct., ASP President welcomes Gambia’s decision not to withdraw from the Rome Statute. ICC-ASP-20170217-PR1274 (Feb. 17, 2017).

¹⁰² South Africa: Withdrawal of Notification of Withdrawal, U.N. Doc. C.N.121.2017.TREATIES-XVIII.10 (Mar. 7, 2017). South Africa’s withdrawal was blocked by the country’s High Court as unconstitutional because the withdrawal had been an attempted executive action that had not been approved by Parliament. *Democratic All. v. Minister of Int’l Rels. & Cooperation*, 2 All SA 123 (S. Afr. 2017).

¹⁰³ Democratic Republic of the Congo; Uganda; Darfur, Sudan; Central African Republic; Kenya; Libya; Côte d’Ivoire; Mali; and Central African Republic II. *Situations Under Investigation*, *supra* note 30.

been African.¹⁰⁴ While Bensouda has in recent years used her proprio motu power to open investigations into several non-African countries,¹⁰⁵ the sense that the ICC has an “Africa problem” remains,¹⁰⁶ even if that characterization is misplaced.¹⁰⁷

B. Involvement of Palestine

Palestine’s involvement in the ICC has also led to accusations that the court is being used as a political weapon.¹⁰⁸ In 2009, the Palestinian National Authority lodged a declaration with the ICC, which purported to accept the court’s jurisdiction over Palestinian territories for incidents that occurred after July 1, 2002, the date the ICC came into existence.¹⁰⁹ The Office of the Prosecutor initiated a preliminary investigation, but in 2012, it concluded that Palestine was not a “state” in terms of Article 12(3) of the Rome Statute and therefore was ineligible to accept the jurisdiction of the court as a nonmember state.¹¹⁰ The prosecutor stated that “competence for determining the term ‘State’ within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly.”¹¹¹ Since neither the Secretary-General nor the General Assembly had recognized Palestine as a state, the court had no jurisdiction based on Palestine’s acceptance

¹⁰⁴ This assertion is based on my reading of the list of individuals indicted by the court, found at *46 Defendants*, INT’L CRIM. CT., <https://www.icc-cpi.int/Pages/defendants-wip.aspx> (last visited Oct. 13, 2021).

¹⁰⁵ Georgia, Bangladesh/Myanmar, and Afghanistan. *Situations Under Investigation*, *supra* note 30.

¹⁰⁶ See, e.g., Lucrecia García Iommi, *Whose Justice? The ICC ‘Africa Problem,’* 34 INT’L RELS. 105 (2020).

¹⁰⁷ For a discussion of why the assumptions underlying the Africa problem are largely incorrect, see Lea Ina Schneider, *The International Criminal Court (ICC) – A Postcolonial Tool for Western States to Control Africa?*, 1 J. INT’L CRIM. L. 90 (2020).

¹⁰⁸ It is not my intention in this Article to take a position on the complex Israeli-Palestinian conflict. Instead, I am using the history of Palestine’s involvement with the ICC to illustrate how the court has become politicized. Whether the court’s prosecution of Israeli or Palestinian nationals would serve the interests of justice is a question that is separate from the reality that such a move would politicize the court.

¹⁰⁹ Palestinian Nat’l Auth. Ministry Just., *Declaration Recognizing the Jurisdiction of the International Criminal Court* (Jan. 21, 2009), <https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

¹¹⁰ Press Release, Off. of the Prosecutor, Int’l Crim. Ct., *Situation in Palestine* (Apr. 3, 2012), <https://www.icc-cpi.int/nr/rdonlyres/c6162bbf-feb9-4faf-afa9-836106d2694a/284387/situationinpalestine030412eng.pdf>.

¹¹¹ *Id.* ¶ 5.

of jurisdiction.¹¹² This initial attempt by Palestine was an obvious example of using the court for political means because Palestine likely knew that the ICC would not recognize it as a state before the UN had done so. Palestine's act of referring the situation to the court was a "political twofer," whereby Israel would be pressured over alleged war crimes while simultaneously building momentum for Palestinian statehood.¹¹³ And in a real sense, it worked. Seven months after the prosecutor refused to proceed, the UN General Assembly conferred nonmember observer status on the State of Palestine,¹¹⁴ which satisfied a precondition for Palestine to join the ICC as a member state.¹¹⁵

On January 1, 2015, Palestine made a second declaration accepting the ICC's jurisdiction—this time over crimes committed since June 13, 2014, in Palestinian territories.¹¹⁶ The day after Palestine accepted jurisdiction, Palestine undertook what some observers referred to as the "nuclear option."¹¹⁷ By acceding to the Rome Statute, the State of Palestine became a member state of the ICC on April 1, 2015.¹¹⁸ Israel dismissed the Palestinian actions as purely political, a "diplomatic

¹¹² *Id.* ¶¶ 6–7.

¹¹³ Brett Schaefer, *Crimes Need to Be Punished, but Is the ICC the Right Means?*, RADIO FREE EUR. RADIO LIBERTY, (Feb. 12, 2009, 12:40 PM), https://www.rferl.org/a/Crimes_Need_To_Be_Punished_But_Is_The_ICC_The_Right_Means/1491999.html [https://perma.cc/XSF2-ESPN].

¹¹⁴ G.A. Res. 67/19 Status of Palestine in the United Nations, ¶ 2 (Nov. 29, 2012).

¹¹⁵ There were reports that the United Kingdom offered to exchange a "yes" vote for reassurance from Palestine that it would not rush to join the ICC. Michelle Nichols, *Palestinians Say No Rush to Join International Court After U.N. Vote*, REUTERS (Nov. 28, 2012, 9:43 AM), <https://www.reuters.com/article/cnews-us-palestinians-statehood-idCABRE8AQ0ZC20121127> [https://perma.cc/6EK7-XZA7]. American and British efforts to get a commitment from Palestine to never accede to the Rome Statute were unsuccessful. Chris McGreal, *International Criminal Court Is a Lever for Palestinians on Israeli Settlements*, GUARDIAN (Dec. 15, 2012, 8:00 AM), <https://www.theguardian.com/commentisfree/2012/dec/15/international-criminal-court-lever-palestinians> [https://perma.cc/KU6D-R8RV].

¹¹⁶ Mahmoud Abbas, President of the State of Palestine, *Declaration Accepting the Jurisdiction of the International Criminal Court* (Dec. 31, 2014), https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf.

¹¹⁷ William Booth, *Palestinians Join International Court to Fight Israel*, WASH. POST (Apr. 1, 2015), https://www.washingtonpost.com/world/palestinians-join-international-criminal-court-to-fight-israel/2015/04/01/e6b79c78-d70c-11e4-bf0b-f648b95a6488_story.html [https://perma.cc/DRD8-82SK].

¹¹⁸ Press Release, Assembly of States Parties, Int'l Crim. Ct., *The State of Palestine Accedes to the Rome Statute*, ICC-ASP-20150107-PR1082 (Jan. 7, 2015).

intifada,” as one official stated.¹¹⁹ As mandated by the Rome Statute,¹²⁰ the prosecutor examined the situation in Palestine.¹²¹ In May 2018, while this preliminary examination was ongoing, the State of Palestine again submitted a reference to the ICC, giving it jurisdiction over “past, ongoing and future crimes within the court’s jurisdiction, committed in all parts of the territory of the State of Palestine.”¹²² This third referral did not change the nature or status of the ongoing preliminary examination. Still, the referral was issued to highlight the urgent and ongoing nature of the alleged offenses.¹²³ Israel dismissed the referral as a “cynical step without legal validity.”¹²⁴

In December 2019, Bensouda announced she had completed her preliminary examination into the situation in Palestine and concluded that there was a reasonable basis to proceed with a formal investigation.¹²⁵ However, Bensouda acknowledged that there were “unique and highly contested legal and factual issues attaching to this

¹¹⁹ William Booth, *With Talks on Ice, Palestinians’ Mahmoud Abbas Declares Diplomatic War on Israel*, WASH. POST (Jan. 9, 2015), https://www.washingtonpost.com/world/middle_east/with-talks-on-ice-palestinians-mahmoud-abbas-declares-diplomatic-war-on-israel/2015/01/09/1048d532-9691-11e4-aabd-d0b93ff613d5_story.html [https://perma.cc/7D6M-3RY8].

¹²⁰ Rome Statute, *supra* note 4, art. 53(1) (“The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute.”).

¹²¹ Press Release, Off. of the Prosecutor, Int’l Crim. Ct., The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, ICC-OTP-20150116-PR1083 (Jan. 16, 2015).

¹²² Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, PAL-180515-Ref (May 15, 2018) ¶ 9, *in* Situation in the State of Palestine, Decision Assigning the Situation in the State of Palestine to Pre-Trial Chamber I, Annex I, ICC-01/18-1-AnxI (May 24, 2018).

¹²³ Thomas Obel Hansen, *Opportunities and Challenges Seeking Accountability for War Crimes in Palestine Under the International Criminal Court’s Complementarity Regime*, 9 NOTRE DAME J. INT’L & COMP. L. 1, 5 (2019).

¹²⁴ Oliver Holmes, *Palestinian Minister Delivers Israel ‘War Crimes’ Referral to ICC*, GUARDIAN (May 22, 2018, 10:37 AM), <https://www.theguardian.com/world/2018/may/22/palestinian-minister-israel-war-crimes-icc-referral> [https://perma.cc/T9RY-SPD3].

¹²⁵ Press Release, Off. of the Prosecutor, Int’l Crim. Ct., Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court’s Territorial Jurisdiction, ¶ 1 (Dec. 20, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine> [https://perma.cc/7B6L-VGFF]; Press Release, Off. of the Prosecutor, Int’l Crim. Ct., Situation in Palestine: Summary of Preliminary Examination Findings ¶ 1, <https://www.icc-cpi.int/itemsDocuments/210303-office-of-the-prosecutor-palestine-summary-findings-eng.pdf>.

situation, namely,” the territorial scope of the Palestinian referral.¹²⁶ Thus, Bensouda sought a ruling on the matter from the Pre-Trial Chamber of the court. This course of action amounted to an extraordinary admission by the prosecutor that the proceedings were highly politicized. In February 2021, the Pre-Trial Chamber held that the territorial scope of Palestine’s criminal jurisdiction, which was delegated to the court by Palestine’s reference, “extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.”¹²⁷ After receiving this go-ahead from the court, in March 2021, Bensouda announced that she would open a formal investigation into the situation in Palestine.¹²⁸

While the complete ramifications of the court’s decision and Bensouda’s subsequent actions have yet to be realized, it is difficult to imagine a situation that could come before the court that would be any more politicized than the Israeli-Palestinian conflict. The reactions to the decisions were predictable. After Bensouda announced her intention to proceed with a formal investigation, Israeli Prime Minister Benjamin Netanyahu described the court’s actions as the “essence of anti-Semitism.”¹²⁹ The U.S. State Department said it was “disappointed” and would continue to “oppos[e] actions that seek to target Israel unfairly.”¹³⁰ Russian foreign minister Sergey Lavrov stated that the court had “repeatedly demonstrated its political bias.”¹³¹ In contrast, Palestinian President Mahmoud Abbas praised the “courage” of the

¹²⁶ Press Release, Off. of the Prosecutor, Int’l Crim. Ct., Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court’s Territorial Jurisdiction (Dec. 19, 2019), <https://www.icc-cpi.int/test-new-master/Pages/pr-new.aspx?name=20191220-otp-statement-palestine> [<https://perma.cc/2J8U-BYR3>].

¹²⁷ Int’l Crim. Ct., *Situation in the State of Palestine, Decision on the “Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine,”* ICC-01/18-143, ¶ 118 (Feb. 5, 2021).

¹²⁸ Press Release, Off. of the Prosecutor, Int’l Crim. Ct., Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine (Mar. 3, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine> [<https://perma.cc/N3CE-UYCS>].

¹²⁹ *ICC Opens “War Crimes” Investigation in West Bank and Gaza*, BBC NEWS (Mar. 3, 2021), <https://www.bbc.com/news/world-middle-east-56249927> [<https://perma.cc/H3PS-2EXP>].

¹³⁰ *Id.*

¹³¹ Elena Teslova, *Russia Urges Direct Talks Between Israel, Palestine*, ANADOLU AGENCY (Mar. 17, 2021), <https://www.aa.com.tr/en/middle-east/russia-urges-direct-talks-between-israel-palestine/2179295> [<https://perma.cc/6RVF-PYTP>].

prosecutor,¹³² and a spokesperson for Amnesty International described the court's actions as a "momentous breakthrough for justice."¹³³ The highly politicized nature of the situation in Palestine means the ICC will not be able to take any further actions in the situation without being accused of being politically motivated. From here on out, even *inaction* in Palestine on the part of the court will lead to accusations of political bias. When the ICC was established, the United States and others worried about a politicized independent prosecutor, but this is not at all how the hyper-politicization of the court happened.

Rather, hyper-politicization has resulted from a weak member state (Palestine) that is determined to fight its occupier (Israel) using the legal tools the international system provides. As a result, Palestine's membership in the ICC and the opening of the situation in Palestine has politicized the court, perhaps to an irreparable degree. Some states that would otherwise be open to working with the ICC will resist doing so if the court attempts to prosecute an Israeli politician or military leader. For instance, the ICC will face increased American resistance—even from a Democratic administration—if the court indicts an Israeli. It is even more likely that many states would object if the court prosecuted a Palestinian. If the prosecutor proceeds with indictments in the situation in Palestine, this—more than any other factor—may be disastrous for the ICC, its reputation, and its continued existence.

CONCLUSION

In this Article, I have suggested that if the ICC remains on its current trajectory, it will die. There will be no formal closing of the courthouse doors in The Hague to signal the court's death. But in a practical sense, the court will die when its member states lose faith in its ability to deliver justice. Such a loss of confidence could result from the court's continued lack of results, perceived impotence, and ongoing politicization. If that should happen, the consequences for the court could come swiftly in the form of budget cuts. Alternatively, the ICC

¹³² Jack Houry, *Palestinian President Thanks ICC for Commitment to 'Pursuing Justice,'* HAARETZ (Mar. 4, 2021), <https://www.haaretz.com/israel-news/premium-palestinian-president-thanks-icc-for-commitment-to-pursuing-justice-1.9590202> [https://perma.cc/F7SK-FYHU].

¹³³ Press Release, Amnesty Int'l, *Israel/OPT: Historic Breakthrough as Prosecutor Confirms Initiation of ICC Investigation in Occupied Palestinian Territories* (Mar. 3, 2021), <https://www.amnesty.org/en/latest/news/2021/03/israel-opt-historic-breakthrough-as-prosecutor-confirms-initiation-of-icc-investigation-in-occupied-palestinian-territories> [https://perma.cc/27FW-G4HY].

could continue its existence in a wounded state by trying only a handful of cases it can extract from the situations that occasionally come before it. If either of these scenarios happens, there will be no shortage of material for historians to discuss what went wrong.