

Michigan Journal of International Law

Volume 42 | Issue 3

2021

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Recommended Citation

Sara L. Ochs, *Propaganda Warfare on the International Criminal Court*, 42 MICH. J. INT'L L. 581 (2021).
Available at: <https://repository.law.umich.edu/mjil/vol42/iss3/5>

<https://doi.org/10.36642/mjil.42.3.propaganda>

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PROPAGANDA WARFARE ON THE INTERNATIONAL CRIMINAL COURT

Sara L. Ochs*

I. INTRODUCTION

Propaganda warfare, while novel in nomenclature, is far from new in practice. In an era dominated by constant news, battles for public opinion complement physical attacks.¹ In fact, “winning modern wars is as much dependent on carrying domestic and international public opinion as it is on defeating the enemy on the battlefield.”² The fight for public opinion has become so valuable to military initiatives that the U.S. Department of Defense Law of War Manual specifically recognizes propaganda directed towards “civilian or neutral audiences” as a “permissible means of war.”³

While propaganda warfare on public opinion was once reserved for military use against state enemies, governments have recently adapted this tactic to target judicial entities seeking to prosecute violations of international criminal laws. State leaders have begun using social media, press statements, and televised conferences to spread disinformation in efforts to demonize entities, like international courts, for investigating and prosecuting their state nationals. And while the precise means of disseminating this propaganda varies by state, the motivation behind the attacks is the same: to convert public opinion against the targeted court to prevent the prosecution of state officials and military leaders. Within the context of the International Criminal Court (“ICC”), this article defines propaganda warfare as states

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1. Laurie R. Blank, *Media Warfare, Propaganda, and the Law of War*, in *CYBER WARFARE, MEDIA WARFARE, AND LAWFARE* 88, 88 (Michael L. Gross & Tamar Meisels eds., 2017) (recognizing that “battle[s] of words” pertaining to legality and legitimacy of military action “often seem to be as important as military capabilities”).

2. Kenneth Payne, *The Media as an Instrument of War*, U.S. ARMY WAR COLL. Q.: PARAMETERS, Spring 2005, at 81, 81.

3. OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, 331 art. 5.26.1-1.2 (2016), <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> [hereinafter “DoD Law of War Manual”].

leaders' systematic and highly publicized use of anti-ICC rhetoric and disinformation about the ICC, its functions, and its jurisdictional reach.

The ICC is by no means the only international entity to bear the brunt of propaganda warfare. However, the ICC, as a treaty-based court lacking an enforcement mechanism, is critically dependent on public legitimacy and state support.⁴ Without this support, the ICC bears little chance of satisfactorily completing its mandate to hold individuals accountable "for the most serious crimes of concern to the international community as a whole."⁵ Indeed, a widespread lack of public legitimacy in recent years has repeatedly precluded the ICC from achieving case-specific goals.⁶ As a court founded upon state support, attacks aimed to deprive the ICC of legitimacy in the eyes of its state supporters are particularly damaging. In ratifying the Rome Statute, which established the ICC, states voluntarily forfeited a portion of their state sovereignty and permitted the ICC to hold their nationals, including their government leaders, accountable. Yet, as a direct result of this consent-based system, states retain significant involvement and control over ICC operations, and the ICC is critically dependent on states' cooperation.⁷ Historically, investigations without state support have proven especially challenging for the ICC, and on a rudimentary level, the ICC's success in any particular case can often be linked to the level of State cooperation it received in investigating that matter.⁸

Successful propaganda wars against the ICC, such as the Kenyan Government's widespread campaign labeling the ICC as a neo-colonialist regime, have proven debilitating for the ICC. What started as a strategy to avoid the prosecution of high-ranking Kenyan state leaders, prompted a widespread anti-ICC movement supported by the African Union that ultimately resulted in the withdrawal of several African states from the Rome

4. Valerie Oosterveld, Mike Perry & John McManus, *The Cooperation of States with the International Criminal Court*, 25 *FORDHAM INT'L L.J.* 767, 767 (2002).

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

6. Yvonne M. Dutton, *Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge*, 56 *COLUM. J. TRANSNAT'L L.* 71, 76 (2017). See generally Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar al-Bashir*, 34 *FORDHAM INT'L L.J.* 1584 (2011) (explaining how states' failure to arrest Sudanese President Omar al-Bashir while present on their state territory undermined the International Criminal Court's ("ICC's") prosecution of Sudanese crimes against humanity).

7. Oosterveld et al., *supra* note 4, at 767 (foreshadowing that the ICC's success would "be determined by the level of cooperation it receives from States").

8. *ASP 2017: State Cooperation Crucial for an Effective ICC*, COAL. FOR INT'L CRIM. CT. (Nov. 7, 2017), <https://www.coalitionfortheicc.org/news/20171107/asp-2017-state-cooperation-crucial-effective-icc#:~:text=With%20no%20enforcement%20mechanism%20of,to%20cooperate%20with%20the%20ICC> (highlighting the detrimental impact on investigations of state non-cooperation by explaining the challenges the ICC Prosecutor has faced in investigating crimes within the Situation in Darfur, Sudan).

Statute. At the time of publication, the ICC is still working to distance itself from claims of discrimination against African nations.⁹

The impact of these propaganda wars runs deeper than mere public image. Often, the use of propaganda and disinformation, combined with the ICC's critical need for state support and cooperation, is sufficient to coerce the ICC to reach a certain ruling or to redirect its limited resources to a different issue. Propaganda wars that are successful in provoking the ICC to dismiss claims against high-profile leaders inject the appearance of bias into ICC operations and inspire other states to act against the Court to prevent investigations into their nationals. The most influential states on the geopolitical stage are also the states with the most influence on global perception. These states include the United States, Russia, and China, all of whom refused to join the ICC out of fear of the infringement of their sovereignty. These states also hold permanent status and veto power on the United Nations Security Council and are therefore influential in situations where the Security Council refers non-States Parties to the ICC.¹⁰ And, as seen recently by the United States' vitriolic response to the ICC's opening of an investigation into crimes committed in Afghanistan, which threatens to implicate U.S. officials, powerful states will aggressively utilize propaganda and disinformation to prevent the ICC from prosecuting their or their allies' nationals.¹¹ These propaganda wars, and the ICC's vulnerability to them, thus carry the risk of exacerbating already significant power disparities in the field of international criminal justice. They further represent the danger that the ICC will become a court that exclusively tries perpetrators from nations too powerless to fight back, while leaving superpowers, like the United States and China, immune from prosecution for atrocities committed on their soil and by their nationals.

Many scholars have addressed the pervasive role politics plays in the ICC's operations,¹² and a significant body of scholarship has explored the

9. See generally Geoff Dancy, Yvonne Marie Dutton, Tessa Alleblas & Eamon Aloyo, *What Determines Perceptions of Bias Toward the International Criminal Court? Evidence from Kenya*, 64(7-8) J. CONFLICT RESOL. 1443 (2019) (recognizing ongoing perceptions of anti-African bias in the ICC).

10. *The UN Security Council*, COUNCIL ON FOREIGN RELS. (Sept. 16, 2020), <https://www.cfr.org/backgrounder/un-security-council> (noting that the United States, Russia, and China are permanent members of the UN Security Council and thus hold the power to veto any Security Council resolution); Alexandre Skander Galand, *The Nature of the Rome Statute of the International Criminal Court and its Amended Jurisdictional Scheme*, 17 J. INT'L CRIM. JUST. 933, 937-38 (2020) (discussing the role of the Security Council in referring situations to the ICC that generally fall outside of its territorial jurisdiction).

11. See *infra* Part IV.

12. See generally OUMAR BA, *STATES OF JUSTICE: THE POLITICS OF THE INTERNATIONAL CRIMINAL COURT* (2020) (exploring the relationship between weaker States Parties and the ICC, and the intersection of power and politics); Christof Royer, *The Bête Noire and the Noble Lie: The International Criminal Court and (the Disavowal of) Politics*, 13 CRIM. L. & PHIL. 225 (2019) (presenting the ICC as a political actor).

importance of legitimacy in ICC functions.¹³ However, the use of propaganda warfare, in the form of disinformation and anti-ICC campaigns, and its impact on public opinion—which lies at the crossroads between politics and legitimacy—has been largely unexplored.¹⁴ This article seeks to fill that gap by examining the extent to which propaganda wars impact the ICC’s decisions and operations. Notably, this article is not intended to read as a critique of how the ICC and its Prosecutor have handled politically sensitive situations in the past. Nor is it intended to provide a comprehensive overview of every propaganda war leveled against the ICC.¹⁵ Rather, through the use of two case studies—those of the Kenyan and United States governments—it aims to identify the extent to which the ICC has had to modify its operations in order to sustain the public legitimacy necessary to fulfill its mandate.

This article argues that the effective use of propaganda warfare against the ICC has the potential to destroy the ICC’s ability to effectively investigate and prosecute the crimes of most concern to the international community. It further suggests that in order to successfully defend against propaganda attacks, like those orchestrated by the Kenyan and United States governments, the ICC must adapt its approach to state relations to foster knowledge of, support for, and cooperation with the ICC’s goals and prosecutorial strategies. The article ultimately seeks to identify workable proposals for the ICC and its Prosecutor to strengthen the ICC’s perceived legitimacy among states parties and non-states parties alike, so as to minimize the detrimental impact posed by state propaganda.

Part II of this article will identify the foundational characteristics of the ICC that render propaganda wars so consequential to its operations, espe-

13. See, e.g., Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L.J. 1400 (2009); Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT’L L. 405 (2012).

14. See Harry M. Rhea & Ryan C. Meldrum, *United States Public Support for the International Criminal Court: A Multivariate Analysis of Attitudes and Attributes*, 37 U. PA. J. INT’L L. 739, 741 (2015) (noting that “little has been written on public opinion and the ICC”).

15. Specifically, this paper will not discuss the ongoing propaganda war being fought by the Philippines in response to the ICC Prosecutor’s *proprio motu* preliminary examination into President Rodrigo Duterte’s “war on drugs.” See *The Philippines’ Membership in the ICC Comes to an End*, COAL. FOR INT’L CRIM. CT. (Mar. 15, 2019), <http://www.coalitionfortheicc.org/news/20190315/philippines-leaves-icc> (explaining how the Philippines withdrew from the Rome Statute as part of its propaganda campaign against the Court). Nor will it analyze in detail Israel’s current battle in response to the Prosecutor’s investigation into crimes committed in Palestine. See Jeffrey Heller, *Netanyahu Accuses ICC of Anti-Semitism in Pursuit of War Crimes Probe*, REUTERS (Dec. 22, 2019), <https://www.reuters.com/article/us-icc-palestinians-israel/netanyahu-accuses-icc-of-anti-semitism-in-pursuit-of-war-crimes-probe-idUSKBN1YQ0KC> (recognizing Prime Minister Benjamin Netanyahu’s accusation that the ICC is anti-Semitic in response to the Prosecutor’s preliminary examination in Palestine).

cially its reliance on state cooperation and its susceptibility to political pressures.

Part III will examine how the Kenyan Government's highly publicized response to the ICC cases against William Ruto and Uhuru Kenyatta marshalled public opinion against the ICC both within Kenya and throughout the African Union. Next, it will analyze how this campaign not only pressured the ICC into dismissing the charges against the two high profile defendants, but also sparked a regional revolution of public opinion against the ICC, the effects of which are still very apparent today.

Part IV will explore the United States' ongoing propaganda war against the ICC instituted in response to the Prosecutor's opening of an investigation into war crimes and crimes against humanity committed in Afghanistan. It will specifically analyze the extent to which a non-State Party superpower can bully the ICC into authoring favorable opinions by combining an anti-ICC public opinion campaign with a lack of investigatory cooperation. It will further consider the potentially devastating legacy that this may have on the ICC.

Part V argues that cultivating greater perceived legitimacy of the ICC, both within and outside its States Parties, will provide the ICC with some immunity from attempted propaganda wars. Specifically, it advocates for more significant, sustained public outreach to foster knowledge and respect for the ICC; the ICC's enhancement of its public image; and the implementation of punitive consequences for States Parties who fail to comply with ICC investigations.

II. THE ICC'S SUSCEPTIBILITY TO PROPAGANDA

Given the unique foundations upon which the ICC is grounded, the ICC is especially vulnerable to both political pressures and widespread public opinion. By signing the Rome Statute, each State Party provided the ICC with jurisdiction over core crimes—genocide, crimes against humanity, war crimes, and the crime of aggression¹⁶—committed on their state territory or by their nationals elsewhere in the world.¹⁷ The Rome Statute does not recognize sovereign immunity, meaning that high-ranking governmental officials, including heads of state, may be subject to ICC investigation and prosecution.¹⁸

16. The term "core crimes" pertains to the four categories of crimes listed in article 5 of the Rome Statute. Christine Schwöbel-Patel, *The Core Crimes of International Criminal Law*, in THE OXFORD HANDBOOK ON INTERNATIONAL CRIMINAL LAW 769, 769–70 (Kevin Jon Heller, Frédéric Mégret, Sarah M. H. Nouwen, Jens David Ohlin & Darryl Robinson eds., 2020).

17. Rome Statute, *supra* note 5, art. 12, ¶¶ 1–2; Yvonne M. Dutton, *Explaining State Commitment to the International Criminal Court: Strong Enforcement Mechanisms as a Credible Threat*, 10 WASH. U. GLOB. STUD. L. REV. 477, 478 (2011).

18. Rome Statute, *supra* note 5, art. 27; *see also* Paul J. Toner, *Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense*, 108 PENN. ST. L. REV.

So long as other jurisdictional requirements are met,¹⁹ the ICC may become apprised of a particular matter through three different means.²⁰ First, a State Party may refer a situation occurring in its own territory or in the territory of another State Party.²¹ Second, and most controversially, the ICC Prosecutor may, on its own *proprio motu* authority vested under article 15 of the Rome Statute, and with approval by the Pre-Trial Chamber, initiate investigations into certain situations.²² Under both of these methods, the ICC's jurisdiction is geographically limited to crimes committed on the territory or by a national of a State Party.²³ Third, the United Nations Security Council may refer situations to the Prosecutor under authority provided by Chapter VII of the Charter of the United Nations.²⁴ For situations opened pursuant to Security Council referral, the ICC's jurisdiction is not geographically limited. The Security Council may refer a matter involving crimes committed anywhere or by anyone in the world, regardless of whether these crimes were committed on the territory of a non-State Party or by a non-State Party national.²⁵

The ICC is a court of limited jurisdiction and a self-recognized "court of last resort,"²⁶ meaning it will only step in to prosecute crimes that a state lacks either the means or desire to prosecute.²⁷ This concept, recognized as the principle of complementarity, is codified in the Rome Statute and provides that a case will be deemed inadmissible before the ICC when it is "investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution," or when it has been investigated by a State, and the State decided not to prosecute, "unless the decision resulted from the unwillingness or in-

899, 901 (2004) (recognizing that the Rome Statute does not provide for a Head of State immunity defense).

19. Article 11 also limits the ICC's jurisdiction to crimes committed after the entry into force of the Statute. Rome Statute, *supra* note 5, art. 11; *see also* Christian M. De Vos, *The International Criminal Court: Between Law and Politics in INTERNATIONAL CRIMINAL LAW IN CONTEXT* 240, 243 (Philipp Kastner ed. 2018) (discussing the jurisdictional limitations imposed by the Rome Statute).

20. Rome Statute, *supra* note 5, art. 13.

21. *Id.* art. 14.

22. *Id.* art. 15.

23. *Id.* art. 12(2).

24. *Id.* art. 13(b).

25. Oona A. Hathaway, Paul K. Strauch, Beatrice A. Walton & Zoe A. Y. Weinberg, *What is a War Crime?* 44 *YALE J. INT'L L.* 53, 95 (2019); Galand, *supra* note 10.

26. *About the International Criminal Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Jan. 5, 2021).

27. *Id.*; *see also* Rome Statute, *supra* note 5, art. 1 (recognizing that the ICC "shall be complementary to national criminal jurisdictions"). Additionally, the ICC will only deem situations to be admissible that do not rise to a level of "sufficient gravity to justify further action by the Court." Rome Statute, *supra* note 5, art. 17(1)(d).

ability of the State genuinely to prosecute.”²⁸ The principle is intended to recognize the ICC’s respect for states’ primary jurisdiction.²⁹ And while measures like the ICC’s limited jurisdiction and the principle of complementarity are designed to facilitate voluntary state involvement in the ICC, the ICC has routinely struggled to balance two fundamental weaknesses: its extreme reliance on the cooperation of its States Parties and its susceptibility to political pressure from States Parties and non-States Parties alike.

A. *Reliance on State Cooperation*

Nearly two decades after the ICC’s creation in 2002, 123 nations ratified the Rome Statute and became States Parties to the ICC.³⁰ States Parties’ obligation to cooperate fully with the ICC’s investigations and prosecutions of crimes is expressly codified in the Rome Statute.³¹ This obligation extends through all stages of investigation and court proceedings and requires states to, among other things, perform provisional arrests,³² facilitate the appearance of witnesses and experts in court, execute searches and seizures, provide witness and victim protection, and question suspects.³³ This requested level of cooperation is especially vital, as the ICC lacks a typical enforcement mechanism. It has no police force or military unit by which to enforce its judgments, warrants, or summons, and as such, the ICC “depends on the political will of countries to cooperate with the ICC.”³⁴ As former ICC Judge Hans-Peter Kaul accurately summarized in a 2011 keynote address, “[t]he ICC is absolutely, one hundred percent, dependent on effective cooperation with States Parties.”³⁵

28. Rome Statute, *supra* note 5, art. 17(1)(a)–(b.).

29. XABIER AGIRRE, ANTONIO CASSESE, ROLF EINAR FIFE, HÅKAN FRIMAN, CHRISTOPHER K. HALL, JOHN T. HOLMES, JANN KLEFFNER, HECTOR OLASOLO, NORUL H. RASHID, DARRYL ROBINSON, ELIZABETH WILMSHURST & ANDREAS ZIMMERMANN, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 3 (2003), <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>. The complementarity principle also seeks to promote the effectiveness and efficiency of investigations and prosecutions, because states are often in the best position to prosecute given their access to evidence and witnesses. De Vos, *supra* note 19, at 241.

30. *The States Parties to the Rome Statute*, INT’L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Aug. 27, 2020).

31. Rome Statute, *supra* note 5, art. 86.

32. *Id.* art. 92.

33. *Id.* art. 93(1).

34. Danial Kaysi & Charles Faint, *Political Will and Multilateral Cooperation in International Justice: An Interview with Richard Goldstone*, 7 YALE J. INT’L AFFS. 90, 91 (2012); see Roy S. Lee, *States’ Responses: Issues and Solutions*, in STATES’ RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW I (Roy S. Lee ed., 2005).

35. H.E. Judge Dr. jur. h. c. Hans-Peter Kaul, Second Vice President Int’l Crim. Ct., Keynote: The International Criminal Court—Current Challenges and Perspectives 8 (Aug. 8,

If a State Party fails to comply with a request from the ICC to cooperate, pursuant to Rome Statute article 87, the ICC may refer the State Party to the Assembly of States Parties or the Security Council, in the event the non-compliance occurs within the context of a Security-Council referred matter.³⁶ Yet, the Rome Statute lacks any defined repercussions that may complement this type of referral.³⁷ Thus, while article 87 appears to carry a heavy punishment, its bark has proven far worse than its bite, and the actual consequences faced by non-compliant parties have essentially been limited to public shaming.³⁸ As the prolific ICC expert Judge Richard Goldstone has noted, if States Parties refuse to cooperate, “there is nothing the court can do other than to make noise.”³⁹

State cooperation is intrinsically connected to the ICC’s perceived legitimacy. Although the term “legitimacy” is often used to broadly refer to “generalized acceptability or success,” a vast field of critical scholarship has categorized varying areas of legitimacy in the context of international courts.⁴⁰ And while there is often a disconnect between sociological legitimacy—“what people perceive to be morally or legally legitimate”—and normative legitimacy—“what really *is* legally or morally legitimate”⁴¹—this distinction is well beyond the scope of the present article. This article’s use of the term “legitimacy” will refer only to the sociological “perceived legitimacy” of the ICC, or how people and states subjectively perceive the legitimacy of operations and justifications for the ICC.⁴²

Despite these highly philosophical underpinnings, the ICC’s need for legitimacy is practically evident. States’ “perceptions of the ICC’s legitimacy affect their willingness to cooperate with the ICC.”⁴³ States and their nationals are more willing to support an institution that they believe operates fairly and effectively and are less willing to support a court perceived as bi-

2011), <https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf> [hereinafter Judge Kaul Keynote Address].

36. Rome Statute, *supra* note 5, art. 87(7).

37. Barnes, *supra* note 6, at 1616–17.

38. See Nada Ali, *Bringing the Guilty to Justice: Can the ICC be Self-Enforcing?* 14 CHI. J. INT’L L. 408, 416 (2014) (noting that the Rome Statute lacks an “enforcement bite” to compel state cooperation).

39. Kaysi & Faint, *supra* note 34, at 91.

40. deGuzman, *supra* note 13, at 1436–37 (identifying three categories of legitimacy: legal legitimacy, which anticipates the “correct application of laws and legal principles”; moral legitimacy, which “refers to the moral justifiability of a judicial regime or decision”; and sociological legitimacy, which “considers the perceptions of relevant audiences that such regime or decision is justified”).

41. *Id.* at 1437 (quoting Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1851 (2005)) (emphasis added).

42. Ford, *supra* note 13, at 406–07 n.1. This specific type of legitimacy falls within the broader category of “sociological legitimacy.” See deGuzman, *supra* note 13, at 1437.

43. C. Cora True-Frost, *Weapons of the Weak: The Prosecutor of the ICC’s Power to Engage the UN Security Council*, 44 FLA. ST. U. L. REV. 261, 315 (2016).

ased, ineffective, or weak.⁴⁴ In democratic states, where governments are—at least theoretically—guided by their constituents’ needs, public opinion and support can directly influence state action on deciding whether to support an ICC investigation.

B. *Vulnerability to Political Pressures*

As a treaty-based court designed to mete out international criminal justice, the ICC is grounded in politics.⁴⁵ Since the ICC is designed to impose individual criminal liability on those responsible for masterminding crimes such as genocide and crimes against humanity, its defendants are often state actors and high-ranking governmental officials, thus creating sensitive geopolitical situations.⁴⁶ While the ICC is not an organ of the United Nations (“U.N.”), it holds close relationships with purely political entities, most notably the U.N. Security Council. The Security Council can refer cases to the ICC and even suspend ongoing ICC investigations on any case it deems “a threat to international peace and security.”⁴⁷ This relationship, along with the composition of the ICC’s States Parties and the types of disputes over which the ICC has jurisdiction, inherently inserts a level of politics into the ICC’s justice agenda.⁴⁸

Many scholars have weighed in on the prevalence of politics in ICC operations.⁴⁹ While ICC Prosecutors and representatives of the court have re-

44. Dutton, *supra* note 6, at 85.

45. Treaties and other international agreements require international cooperation by their signatories in order to be effective; treaties are only likely to be successful when they achieve “political buy-in” from their signatories’ governments. Emily O’Brien & Richard Gowan, *What Makes International Agreements Work* 3 (N.Y.U. Ctr. on Int’l Coop. ed., Sept. 2012), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7839.pdf>; see also WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES (2012) (recognizing that the “political dimensions [of international criminal justice] are inescapable”).

46. Westen K. Shilaho, *The International Criminal Court and the African Union*, 18 AFR. J. ON CONFLICT RESOL. 119 (2018).

47. Benson Chinedu Olugbuo, *Law and Politics at the International Criminal Court*, OPEN DEMOCRACY (Aug. 24, 2015), <https://www.opendemocracy.net/en/openglobalrights-openpage/law-and-politics-at-international-criminal-court>; see also Beth Van Schaack, *Deconstructing Syria’s Would-be International Criminal Court Referral: The Politics of International Justice*, 56 STAN. J. INT’L L. 1, 6 (2020) (explaining that the Rome Statute grants the Security Council the ability to refer and defer investigations and cases; compel state cooperation; and “make a determination that a state committed an act of aggression”).

48. BA, *supra* note 12, at 65–66; see also Olugbuo, *supra* note 47 (noting that “although the ICC is a legal institution, it is surrounded by political actors”).

49. See, e.g., Sascha Dominik, Dov Bachmann & Eda Luke Nwibo, *Pull and Push—Implementing the Complementarity Principle of the Rome Statute of the ICC Within the African Union: Opportunities and Challenges*, 43 BROOK. J. INT’L L. 457, 520 (2018) (recognizing that while justice may not be a political tool, it “cannot, in practical terms, be completely isolated from the politics of those advancing its cause”); H. Christie, *The Poisoned Chalice: Imperial Justice, Moral Relativism, and the origins of International Criminal Law*, 72 U. PITT. L. REV. 361, 365 (2010) (opining that political influence is “inherent in the very nature”

peatedly disavowed the notion that politics plays any role in prosecutorial or judicial operations,⁵⁰ this apolitical façade is unrealistic. In fact, in a statement now out of character for the outwardly apolitical ICC, Judge Eboe-Osuji recognized that the view “that international law is capable of operating in a politically sterile environment implicates amazing naiveté as to how life really works.”⁵¹ Given the nature of the crimes, the defendants falling within the ICC’s jurisdiction, and the incessant interweaving of government involvement in the creation and operations of the ICC, it is disingenuous for the field of international criminal law to attempt to remove itself entirely from political pressures.

While the ICC boasts a long list of States Parties that carry influence on the geopolitical stage, several of those nations who hold the most political power over the ICC—The United States, Russia, and China—are absent from that list.⁵² Although all three nations have been past supporters of international criminal justice initiatives, such as ad hoc and hybrid courts designed to prosecute atrocity crimes in countries like Rwanda, the Former Yugoslavia, and Cambodia, none have proven willing to join the Rome Statute.⁵³ The reasons for this are unsurprising: As a permanent, treaty-based international court, the ICC is starkly different from these previous courts. The ICC provides far less of a shield against superpowers, and the

of international criminal law, and it is impossible to divorce justice for war crimes or crimes against humanity entirely from the “political element”); BA, *supra* note 12, at 5 (“[T]he ICC is inherently a political institution that makes the distinction between friends and enemies of the international community.”).

50. See, e.g., Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 941, 942 (2011) (referencing a keynote address made by former ICC Prosecutor, Luis Moreno-Ocampo, in which he claimed, “I apply the law without political considerations. But the other actors have to adjust to the law.”); Thomas Obel Hansen, *The International Criminal Court and the Legitimacy of Exercise*, in LAW AND LEGITIMACY 5, 7 (Per Andersen, Cecilie Eriksen, & Bjarke Viskum eds., 2015) (referring to statements made by the former ICC President in which he noted the absence of a “shred of evidence . . . that the court has done anything political,” and by current ICC Prosecutor Fatou Bensouda, in which she claimed “the Prosecutor does not take into account any political considerations” in determining whether to open an investigation); Benjamin Duerr, *Twenty Years On: The ICC and the Politicization of its Mechanisms*, IPI GLOB. OBSERVATORY (Aug. 7, 2018), <https://theglobalobservatory.org/2018/08/twenty-years-icc-politicization-mechanisms> (arguing that while the ICC holds itself out as a purely legal and apolitical body, in actuality, it is “carefully balancing the ideal—an apolitical approach merely based on the law—and a more realistic approach, thus, accommodating the interests of the governments involved”).

51. Hansen, *supra* note 50, at 13 (quoting Prosecutor v. Kenyatta, ICC-01/09-01/11-1334-Anx-Corr, Separate Further Opinion of Judge Eboe-Osuji, ¶ 11 (Oct. 21, 2013)).

52. De Vos, *supra* note 19, at 253–54.

53. ERNA PARIS, THE SUN CLIMBS SLOW 49–51 (2008) (recognizing U.S. support of international criminal justice ventures prior to the Rome Conference, such as the creation of the ad hoc tribunals for the Former Yugoslavia and Rwanda, as well as the establishment of international hybrid tribunals to prosecute atrocities committed in Cambodia, East Timor, and Sierra Leone).

crimes that fall within the Rome Statute’s jurisdiction—genocide, crimes against humanity, war crimes, and aggression—often implicate superpowers and their allies.⁵⁴ These powerful nations are willing to provide selective support of international criminal tribunals so long as the tribunals complement their national interests, but none are willing to support an initiative by which its leaders or government officials may be held accountable.⁵⁵

The United States, Russia, and China all serve as permanent members of the U.N. Security Council and carry veto power over Security Council decisions.⁵⁶ Thus, even though each nation has refused to ratify the Rome Statute and join the ICC, they nonetheless hold great weight in deciding which cases the ICC hears, especially those involving crimes committed on non-States Parties’ territories. It should also be noted that non-States Parties, including these three nations, have no legal obligation to cooperate with or support the ICC.⁵⁷

The level of power non-States Parties hold over the ICC is more than just theoretical. As Judge Kaul has noted, we live in a “challenging reality” in which “powerful States and permanent members of the Security Council . . . somehow [instrumentalize] the ICC, to use it for their political purposes and interests.”⁵⁸ Indeed, to date, the Security Council has referred only two situations to the ICC—Darfur and Libya⁵⁹—and China and Russia have repeatedly vetoed attempts to refer the situation in Syria.⁶⁰ Political maneuverings both within and surrounding the ICC, have come to a head in recent years, in large part due to the Prosecutor’s increased use of her *proprio motu* authority to open cases and the ICC’s expanding reach over cases implicat-

54. See Kaysi & Faint, *supra* note 34, at 92 (noting the United States perspective that “international justice is a great idea for the rest of the world but not such a good idea when it comes to home”).

55. *Id.* at 92 (recognizing Judge Richard Goldston’s view that “The powerful don’t like oversight, [they] don’t like being policed . . . [and they] don’t like smaller nations judging their military and civilian leaders.”).

56. *Voting System*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/content/voting-system> (last visited Mar. 14, 2021).

57. Corrina Heyder, *The U.N. Security Council’s Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Court’s Functions and Status*, 24 BERKLEY J. INT’L L. 650, 654–55 (2006).

58. Judge Kaul Keynote Address, *supra* note 35, at 9–10; see also Jonathan Paul Bracewell, *Will it Float? The International Criminal Court Without the United States*, 6 REGENT J. INT’L L. 483, 504 (2008) (explaining that the United States argued for greater Security Council control over the Court during the negotiations for the Rome Statute so that the U.S. could establish lasting control over the Court).

59. *In Hindsight: The Security Council and the International Criminal Court*, SEC. COUNCIL REP. (Jul. 31, 2018), https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php.

60. U.N. SCOR, 69th Sess., 7180th mtg., U.N. Doc. S/PV.7180 (May 22, 2014) (reflecting China and Russia’s May 22, 2014 veto of resolution to refer the Syrian situation to the ICC).

ing world powers, including the opening of situations into crimes committed in Palestine, Iraq, and Afghanistan.

III. THE SITUATION IN KENYA

The ICC's Situation in Kenya is notable for many reasons. It marked the first time that a state challenged the admissibility of a case on complementarity grounds,⁶¹ and it was also the first investigation opened by the ICC Prosecutor *proprio motu*.⁶² This marked a significant shift in the ICC and specifically the Prosecutor's strategy. Up until this point, all of the situations handled by the ICC, including those in Uganda, the Democratic Republic of Congo, and the Central African Republic, had been referred to the ICC by the states themselves.⁶³ As a result, the Prosecutor had prior assurance of some cooperation in conducting its investigations in these self-referred situations.⁶⁴ This radically changed with the Situation in Kenya, where Kenyan leaders refused to cooperate and actively sought to undermine the Prosecutor's investigation. This lack of cooperation, complemented by an anti-ICC propaganda war deftly spearheaded by defendants and current Kenyan President Uhuru Kenyatta and Deputy President William Ruto, resulted in the dismissal of all charges against all named defendants.⁶⁵ Not only did propaganda successfully prompt the dismissal of these charges, but it ultimately marred the ICC's legitimacy in Africa and globally, sparking a backlash from which the ICC has yet to fully recover.

A. Background of the Situation in Kenya

The Situation in Kenya stems from violence committed in the wake of the country's December 2007 election. The election, as typical for Kenyan political elections,⁶⁶ fell along ethnic lines, pitting the incumbent Mwai Kibaki, a member of Kenya's Kikuyu tribe, against Raila Odinga, an ethnic

61. Christopher Totten, Hina Asghar & Ayomipo Ojutalayo, *The ICC Kenya Case: Implications and Impact for Proprio Motu and Complementarity*, 13 WASH. U. GLOB. STUD. L. REV. 699, 700 (2014).

62. Simeon P. Sungi, *The Kenyan Cases and the Future of the International Criminal Court's Prosecutorial Policies*, 2 AFR. J. INT'L CRIM. JUST. 153, 153 (2015).

63. BA, *supra* note 12, at 92.

64. *Id.* at 92.

65. Anjli Parrin, *Kenya ICC Case Dismissed for Lack for Evidence, Declared a Mistrial*, COLUMBIA L. SCH.: HUM. RTS. INST. (Apr. 5, 2016), <https://web.law.columbia.edu/human-rights-institute/news-features/press-releases/kenya-icc-case-dismissed-lack-evidence-declared-mistrial> (noting that the dismissal of the case against Ruto terminated the "sole remaining Kenya case" before the Court).

66. BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE 17 (Hum. Rts. Watch ed., Mar. 2008), <https://www.hrw.org/sites/default/files/reports/kenya0308web.pdf> [hereinafter BALLOTS TO BULLETS] (recognizing that "the political manipulation of ethnicity is almost a tradition in Kenyan politics").

rival of Kibaki.⁶⁷ Following what appeared to be election rigging to ensure Kibaki's victory,⁶⁸ violence—much of which was likely pre-planned—broke out throughout Kenya's Rift Valley.⁶⁹ Death squads targeted Kikuyus and sparked retaliatory violence.⁷⁰ The violence expanded throughout the nation, and by its conclusion in February 2008, over 1,000 people had been killed, 900 were raped or sexually brutalized, 3,500 were seriously injured, and 350,000 people had been forcibly displaced.⁷¹

In 2008, the Kenyan Government established a Commission of Inquiry on Post-Election Violence.⁷² In its October 2008 report, following a thorough investigation, the Commission presented its recommendations for achieving justice. These included the creation of a special tribunal, a hybrid court intended to sit within Kenya with both Kenyan and international judges, investigators, and staff, so as to ensure independent impartiality in the tribunal investigations and prosecutions.⁷³ This proposal stemmed from the Commission's acknowledgment that the governmental institutions within Kenya, including the judiciary, "were not impartial and lacked integrity."⁷⁴ In February 2009, the Kenyan Parliament voted against the proposal for a special tribunal.⁷⁵ The result was not unexpected, as many members of Par-

67. James Verini, *The Prosecutor and the President*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html?smid=tw-share&r=2>.

68. Totten, *supra* note 61, at 704–05.

69. *Id.* at 705.

70. Susanne D. Mueller, *Kenya and the International Criminal Court (ICC): Politics, the Election, and the Law*, 8 J. E. AFR. STUD., no. 1, 2014, at 25, 27.

71. Kenya, INT'L CRIM. CT., <https://www.icc-cpi.int/kenya> (last visited Aug. 25, 2020). As with most periods of extensive violence, the precise calculations of the numbers of individuals killed, injured, or displaced are in dispute. See, e.g., BALLOTS TO BULLETS, *supra* note 66, at 2 (stating that over 1,000 were killed and up to 500,000 internally displaced as a result of the post-election violence); Verini, *supra* note 67 (placing these figures even higher; estimating that between 1,100 and 1,200 individuals were killed and a half a million people were displaced as a result of the violence).

72. Specifically, the Commission of Inquiry on Post-Election Violence (more commonly known as the "Waki Commission"), as well as a Truth, Justice, and Reconciliation Commission were created as a product of the power-sharing agreement negotiated by former U.N. Secretary General Kofi Annan. Totten, *supra* note 61, at 706–07; *The Kenyan Commission of Inquiry into Post-Election Violence*, INT'L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf> (last visited Sept. 1, 2020).

73. TRUTH, JUST., & RECONCILIATION COMM'N, COMMISSIONS OF INQUIRY-CIPEV REPORT (WAKI REPORT) 472–75 (2008), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1004&context=tjrc-gov> [hereinafter WAKI REPORT].

74. *Id.* at 28.

75. *Timeline*, INT'L JUST. MONITOR, <https://www.ijmonitor.org/kenya-cases-timeline> (last visited Sept. 8, 2020); Verini, *supra* note 67.

liament were believed to have been directly involved in orchestrating the violence.⁷⁶

In light of Kenya's failure to create the proposed Special Tribunal or to conduct objectively satisfactory domestic trials against those allegedly responsible for the post-election violence, the Commission delivered its evidence, including a list of suspects implicated in the violence, directly to the ICC's first Prosecutor, Luis Moreno Ocampo.⁷⁷ Based on this evidence, Ocampo chose to open the Situation into the violence on his own authority.⁷⁸ Given that he opened the investigation *proprio motu*, he was obligated pursuant to Rome Statute article 15 to first request and obtain authorization from the Pre-Trial Chamber to proceed with the investigation,⁷⁹ which Pre-Trial Chamber II granted in March 2010.⁸⁰

In March 2011, upon Ocampo's request, the Pre-Trial Chamber issued a summons for six defendants to be tried in two separate cases.⁸¹ Notable among the defendants were Uhuru Kenyatta, who served as Kenya's Deputy Prime Minister and Minister of Finance, and who is the son of Kenya's first president,⁸² and William Ruto, a Kenyan Parliamentarian.⁸³ Kenyatta was charged, based on allegations that he provided institutional support for the post-election violence, with five counts of crimes against humanity for murder, deportation or forcible transfer, rape, persecution, and other inhumane acts.⁸⁴ Ocampo also charged Ruto as an indirect perpetrator with three charges of crimes against humanity for murder, deportation or forcible

76. Verini, *supra* note 67.

77. Press Release, Int'l Crim. Ct., Waki Commission List of Names in the Hands of ICC Prosecutor (Jul. 16, 2009), <https://www.icc-cpi.int/Pages/item.aspx?name=pr439>; Kenya, COAL. FOR INT'L CRIM. CT., <http://www.coalitionfortheicc.org/country/kenya> (last visited Sept. 1, 2020).

78. Yvonne M. Dutton, *Enforcing the Rome Statute: Evidence of (Non) Compliance from Kenya*, 26 IND. INT'L & COMP. L. REV. 7, 12 (2016).

79. Rome Statute, *supra* note 5, art. 15.

80. Press Release, Int'l Crim. Ct., ICC Judges Grant the Prosecutor's Request to Launch an Investigation on Crimes Against Humanity with Regard to the Situation in Kenya (Mar. 31, 2010), <https://www.icc-cpi.int/Pages/item.aspx?name=icc+judges+grant+the+prosecutor%E2%80%99s+request+to+launch+an+investigation+on+crimes+a>.

81. Mueller, *supra* note 70, at 27.

82. *Kenyatta Case*, INT'L CRIM. CT., <https://www.icc-cpi.int/kenya/kenyatta> (last visited Sept. 1, 2020); *Uhuru Kenyatta*, COAL. FOR INT'L CRIM. CT., <http://www.coalitionfortheicc.org/cases/uhuru-kenyatta> (last visited Sept 1, 2020).

83. *William Ruto and Joshua Sang*, COAL. FOR INT'L CRIM. CT., <http://www.coalitionfortheicc.org/cases/william-ruto-and-joshua-sang> (last visited Sept. 1, 2020). The Court also summoned Henry Kogsey and Joshua Sang to appear alongside Ruto as defendants in the first case, which dealt primarily with crimes against humanity committed against Kikuyu supporters, and Francis Muthaura and Mohammed Hussein Ali to appear alongside Kenyatta in the second case, which concerned the hiring of the Mungiki militia to inflict retaliatory violence against non-Kikuyu supporters. Mueller, *supra* note 70, at 26.

84. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Case Information Sheet at 1, (Mar. 13, 2015), <https://www.icc-cpi.int/CaseInformationSheets/KenyattaEng.pdf>.

transfer, and persecution for his alleged involvement in organizing and supporting a common plan to forcibly expel Kikuyu supporters and their allies from the Rift valley.⁸⁵

Prior to Prosecutor Ocampo's leveling of charges against Kenyatta and Ruto, Kenya was largely supportive of the ICC. An Ipsos Kenya poll in October 2010 indicated that sixty-eight percent of Kenyans supported ICC involvement in investigating and prosecuting the post-election violence.⁸⁶ Indeed, both defendants were some of the Kenyan Parliament's "strongest supporters" in favor of the ICC handling the post-election violence cases in 2009 when they sought to avoid efforts to establish a domestic tribunal to prosecute post-election violence.⁸⁷ However, once the Prosecutor announced charges, the popular view among Kenyans changed; fewer Kenyans continued to support ICC intervention and instead threw their support behind Kenyatta and Ruto.⁸⁸ This public support ultimately served as a vital tool in the two defendants' defense.

B. *The Kenyan Propaganda Campaign*

Despite hailing from opposite sides of the political aisle and even being charged with committing crimes against humanity against each other's political and ethnic groups,⁸⁹ Kenyatta and Ruto found political gold littered among their ICC charges. In April 2011, after returning from their first appearances before the ICC, Kenyatta and Ruto jointly conducted a prayer rally during which they attributed their charges to "politics and Western meddling."⁹⁰ Shortly thereafter, despite the pending ICC charges, the two rivals decided to team up to create the Jubilee Coalition and run on the same ticket for the forthcoming 2013 presidential election.⁹¹ Given the two men's unique predicament, they chose to utilize the ICC charges as the primary focus of their campaign and joined forces over a common message of "ha-

85. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Case Information Sheet (Apr. 2016), <https://www.icc-cpi.int/CaseInformationSheets/RutoSangEng.pdf>.

86. RORISANG LEKALAKE & STEPHEN BUCHANAN-CLARKE, AFROBAROMETER, SUPPORT FOR THE INTERNATIONAL CRIMINAL COURT IN AFRICA 4 (2015), http://afrobarometer.org/sites/default/files/publications/Policy%20papers/ab_r6_policy_paperno23_kenya_anti_corruption.pdf.

87. Samuel M. Makinda, *Kenya, Uhuru Kenyatta and Politicising the International Criminal Court*, CONVERSATION (May 30, 2013, 1:12 AM), <https://theconversation.com/kenya-uhuru-kenyatta-and-politicising-the-international-criminal-court-14583>.

88. LEKALAKE & BUCHANAN-CLARKE, *supra* note 86, at 4 (noting support for ICC intervention dropped from sixty-eight percent to fifty-seven percent following the announcement of the charges); *see also* Verini, *supra* note 67.

89. Geoffrey Lugano, *Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya*, 11 INT'L J. TRANS. JUST. 9, 17 (2017).

90. Dutton, *supra* note 6, at 110.

91. *Id.*

ted for the ICC.”⁹² Specifically, the men crafted a narrative labeling the ICC as a “neocolonialist institution biased against Africa and improperly intruding on Kenyan sovereignty” and painted themselves as “victims of Western imperialism.”⁹³ They further argued that the ICC targeted them exclusively for political reasons and approached the investigation with bias and a lack of understanding.⁹⁴ The campaign allowed for the opportunity to drum up support from the Kenyan populace, and had the added benefit of delegitimizing the charges against them—and the ICC itself—in the eyes of the Kenyan population.

While Kenyatta and Ruto’s claims of African bias were widely accepted, especially throughout Kenya,⁹⁵ they were also filled with misrepresentations. As grounds for their arguments, Kenyatta and Ruto relied heavily on the fact that as of 2013, the ICC had exclusively investigated, indicted, and prosecuted African nationals. While this statement is accurate,⁹⁶ it fails to consider the context in which these investigations were opened. Most of the African situations before the ICC had been self-referred, and as of 2013, the ICC Prosecutor was also conducting preliminary investigations into situations in non-African countries, including Afghanistan, Honduras, and Korea.⁹⁷ Of the eight African situations that were before the ICC in 2013, only Kenya was the result of a *proprio motu* investigation.⁹⁸ Two others—Libya and Sudan—were referred to the ICC by the Security Council. And, as Prosecutor Fatou Bensouda—a Gambian national—has noted, the remaining five cases “were at the request of African states asking for the ICC’s intervention.”⁹⁹ So, while Kenyatta and Ruto’s highly publicized claims ap-

92. Verini, *supra* note 67.

93. Dutton, *supra* note 6, at 109, 110.

94. Dancy et al., *supra* note 9, at 1447.

95. LEKALAKE & BUCHANAN-CLARKE, *supra* note 86, at 8 (stating that, as of 2014, thirty-five percent of Kenyans polled by Afrobarometer believed the ICC to be biased against Kenyans and African states in general).

96. See, e.g., Nanjala Nyabola, *Does the ICC Have an Africa Problem?*, GLOB. POL’Y F. (Mar. 28, 2012), <https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/51456-does-the-icc-have-an-africa-problem.html>.

97. See Int’l Crim. Ct., Report on Preliminary Examination Activities (2013), ¶ 18 (Nov. 25, 2013), <https://www.icc-cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF>.

98. Kenneth Roth, *Africa Attacks the International Criminal Court*, HUM. RTS. WATCH (Jan. 14, 2014, 3:22 PM), <https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court>.

99. *Id.*; Mark Caldwell, *African Union Criticizes International Criminal Court at Member States’ Meeting*, DW (Nov. 19, 2015), <https://www.dw.com/en/african-union-criticizes-international-criminal-court-at-member-states-meeting/a-18862799>; see also Tim Cocks, *ICC Says Protecting Africans, Not Targeting Them*, REUTERS (June 30, 2011, 1:20 AM), <https://af.reuters.com/article/idAFJ0E75T02A20110630> (quoting Prosecutor Bensouda’s explanation by explaining that the ICC’s focus on Africa has always been the result of the

peared facially accurate, many scholars and ICC experts viewed them as misrepresentative, or at best, overly simplistic.¹⁰⁰

As the Jubilee Coalition, Kenyatta and Ruto continued to utilize local radio shows, nationally televised talk shows, and newspaper opinion articles to spread their anti-ICC campaign message and accompanying disinformation.¹⁰¹ They also framed the 2013 presidential campaign around the critical issue of the ICC's presence in Kenya, essentially turning the election into a referendum on the ICC.¹⁰² The men's propaganda war proved almost immediately successful in drawing Kenyan support away from the ICC and in their favor.¹⁰³ Their labeling of the ICC as a neo-colonialist and anti-African entity resonated with the Kenyan populace, largely because of the lack of public awareness and knowledge about the ICC in Africa.¹⁰⁴ As a result, according to reporting by the International Justice Monitor, a poll conducted in June 2013 reflected Kenyan public support for the ICC at an all-time low, with only thirty-nine percent of respondents supporting the ICC process.¹⁰⁵ Kenyatta and Ruto were eventually able to distort the charges against them to work in their favor, ultimately winning the Kenyan presidential election,¹⁰⁶ with Kenyatta officially becoming the first sitting head of state to appear before the ICC.¹⁰⁷

African people's engagement with the ICC, and that her investigations and prosecutions have aimed to provide justice for the victims, all of whom have been African).

100. See, e.g., Phil Clark, *Why International Justice Must Go Local: the ICC in Africa*, AFR. RSCH. INST. (Mar. 12, 2019), <https://www.africaresearchinstitute.org/newsite/publications/why-international-justice-must-go-local-the-icc-in-africa/> (explaining that "criticism of the [ICC] on the grounds of anti-African bias or neo-colonialism is simplistic"); Dutton, *supra* note 6, at 117 (noting that "a great deal of evidence shows that the ICC functions fairly and without clear institutional bias against Africa"); Alette Smeulers, Maartje Weerdesteijn & Barbora Hola, *The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance*, 15 INT'L CRIM. L. REV. 1, 38 (2015) (concluding based on empirical evidence that criticism that the ICC is biased against African countries "seems to be exaggerated"); see also, Nyabola, *supra* note 96 (noting that all of the ICC's African situations involve "intractable crises that the international community has struggled to resolve in a just and timely manner").

101. Lugano, *supra* note 89, at 11.

102. *Id.* at 11.

103. See Dutton, *supra* note 6, at 109 (recognizing that as a result of the propaganda, "ordinary Kenyans supported those charged with crimes against humanity—instead of the international institution trying to bring perpetrators to justice").

104. See *id.* at 109.

105. Tom Maliti, *Two Opinion Polls Show Support for the ICC Drops in Kenya*, INT'L JUST. MONITOR (July 13, 2013), <https://www.ijmonitor.org/2013/07/two-opinion-polls-show-support-for-the-icc-drops-in-kenya/> (relying on a poll conducted by Ipsos Synovate and also noting that this reflected a drop of sixteen percentage points pertaining to support of the ICC from a similar poll conducted in April 2012).

106. See *Did the ICC Help Uhuru Kenyatta Win Kenyan Election?* BBC NEWS (Mar. 11, 2013), <https://www.bbc.com/news/world-africa-21739347>.

107. Dutton, *Enforcing the Rome Statute*, *supra* note 78, at 27.

Kenyatta and Ruto's propaganda warfare did not end with the Jubilee's Coalition election victory, nor did it remain within the geographic confines of Kenya. After the Kenyan Parliament moved to withdraw the country from the Rome Statute—a result that never came to fruition¹⁰⁸—Kenyatta and Ruto took their propaganda arguments to the African Union (“A.U.”).¹⁰⁹ The A.U. is a coalition of fifty-four African member nations, based loosely on the European Union model,¹¹⁰ which aims to achieve greater unity and solidarity between African countries and promote peace, stability, human rights, and democratic values throughout Africa.¹¹¹

In October 2013, the A.U. held a special summit to discuss Africa's relationship with the ICC.¹¹² During the summit, Kenyatta took the floor and re-asserted his accusations that the ICC is anti-African and claimed that the ICC was engaged in “race-hunting” as a “toy of declining imperial powers.”¹¹³ His statements helped galvanize the A.U. into taking the position that sitting heads of state should be immune from arrest and prosecution before the ICC and to call on the U.N. Security Council to defer proceedings against Kenyatta and Ruto.¹¹⁴ While the ICC and the Security Council declined to follow the A.U.'s recommendations, Kenyatta and Ruto's propaganda left a lasting impression in Kenya and throughout A.U. countries that ultimately grew into a full-scale revolution against the ICC.

C. A Lack of Cooperation

Kenyatta and Ruto supplemented their propaganda war against the ICC with a strategy of non-compliance and obstruction to prevent the Prosecutor from obtaining necessary evidence for trial. From the outset, the Prosecu-

108. L. MUTHONI WANYEKI, INST. FOR SEC. STUD., *THE INTERNATIONAL CRIMINAL COURT'S CASES IN KENYA: ORIGIN AND IMPACT* 13 (Apr. 2012), <https://media.africaportal.org/documents/Paper237.pdf>.

109. See Katrina Manson, *African Union to Vote on Kenyatta Trial*, FIN. TIMES (May 25, 2013), <https://www.ft.com/content/af9ac982-c556-11e2-af7a-00144feab7de> (explaining the origins of how Kenya's feud with the ICC became a focal point of the African Union's 2013 Assembly session); see also *African Union Summit on ICC Pullout over Ruto Trial*, BBC NEWS (Sept. 20, 2013), <https://www.bbc.com/news/world-africa-24173557> (quoting an A.U. official noting that Kenya had been “criss-crossing Africa in search of support” for their stance against the ICC).

110. *Profile: African Union*, BBC NEWS (Aug. 24, 2017), <https://www.bbc.com/news/world-africa-16910745>.

111. *About the African Union*, AFR. UNION, <https://au.int/en/overview> (last visited Jan. 5, 2021); *AU in a Nutshell*, AFR. UNION, <https://au.int/en/au-nutshell> (last visited Jan. 5, 2021).

112. Solomon Ayele Dersso, *The AU's Extraordinary Summit Decisions on Africa-ICC Relationship*, EJIL: TALK! (Oct. 28, 2013), <https://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/>.

113. *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC NEWS (Oct. 12, 2013), <https://www.bbc.com/news/world-africa-24506006>.

114. See Dersso, *supra* note 112.

tor's investigation was met with repeated refusals to cooperate.¹¹⁵ Despite multiple requests for documents, including those pertaining to security meetings held in Kenya during the post-election violence, cell phone records, and financial documents that could tie the defendants to allegations that they financed the violence, the Kenyan Government—led by Kenyatta and Ruto—refused to turn these over.¹¹⁶ The Government's refusal to cooperate with the Prosecutor's numerous formal requests for evidence ultimately led Prosecutor Bensouda to petition the Trial Chamber to find the Government of Kenya non-compliant in violation of article 87 of the Rome Statute.¹¹⁷ The Trial Chamber ultimately found Kenya's non-compliance to fall "below the standard of good faith cooperation required from States Parties,"¹¹⁸ yet declined to refer Kenya to the Assembly of States Parties as permitted by the Rome Statute, deeming the Prosecution partially responsible for failing to quickly and repeatedly follow up on the Kenyan Government's refusal to turn over evidence.¹¹⁹

In addition to this non-compliance, members of the Kenyan Government also engaged in underhanded tactics, instituting a level of witness interference that Prosecutor Bensouda described as "unprecedented."¹²⁰ Ben-

115. See Jennifer Stanley, *From Nuremberg to Kenya: Compiling the Evidence for International Criminal Prosecutions*, 49 VAND. J. TRANSNAT'L L. 819, 840 (2016).

116. See, e.g., Michael Onyiego, *Legal Challenges Threaten to Undermine ICC Investigation in Kenya*, VOA NEWS (Oct. 3, 2010), <https://www.voanews.com/africa/legal-challenges-threaten-undermine-icc-investigation-kenya> (noting that the government would not release reports from high-level security meetings); Dutton, *supra* note 78, at 28 (noting that the government failed to turn over requested cell phone records that could have tied the defendants to organizing the violence); Prosecutor v. Kenyatta, ICC-01/09-02/11, Prosecution Application for a Finding of Non-compliance, ¶¶ 6–21, (Nov. 29, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_10100.PDF [hereinafter Prosecution Application for Non-Compliance] (outlining the Prosecutor's original request for financial and other records made in April 2012 and a litany of follow-up attempts to secure the evidence, all of which proved unsuccessful).

117. Prosecutor Application for Non-Compliance, *supra* note 116, ¶¶ 1–2.

118. Prosecutor v. Kenyatta, ICC-01/09-02/11, Decision on Prosecution's Application for Finding of Non-compliance under Article 87(7) of the Statute, ¶ 67, (Dec. 3, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09899.PDF [hereinafter Trial Chamber's Decision on Non-Compliance].

119. Trial Chamber's Decision on Non-Compliance, *supra* note 118, at ¶¶ 85–89; see also Prosecutor v. Kenyatta, ICC-01/09-02/11, Decision on Prosecution's Applications for a Finding of Non-compliance Pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date, ¶ 52, (Mar. 31, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_03112.PDF. The Trial Chamber originally declined to formally find Kenya in non-compliance and simply granted a six-month adjournment in response to the Prosecution's initial request. Trial Chamber's Decision on Non-Compliance, *supra* note 118, at ¶ 15. Following Kenya's continued failure to cooperate, at a status conference in October 2014, Prosecutor Bensouda orally maintained her initial application for a finding of noncompliance, prompting the Trial Chamber to again address the pleading. *Id.*

120. Natlie Ojewski, *Uhuru Kenyatta's Trial: A Case Study in What's Wrong with the ICC*, GLOBALPOST (Feb. 6, 2014), <https://www.pri.org/stories/2014-02-06/uhuru-kenyattas-trial-case-study-whats-wrong-icc>.

souda's investigation was thwarted by a widespread social media campaign used to identify confidential witnesses as well as "concerted and wide-ranging efforts to harass, intimidate, and threaten" potential witnesses.¹²¹ Following the conclusion of the case against Ruto, Bensouda reported that seventeen witnesses ultimately withdrew their cooperation as a result of threats, public shaming, and intimidation from Kenyan politicians, community leaders, and anonymous bloggers on social media.¹²² At the same time, the Prosecutor's investigation was undermined by a "steady and relentless stream of false media reports about the Kenya cases."¹²³ The Kenyan media would run stories supported by the defendants' legal teams that foreign nations were seeking to intervene in the case proceedings in efforts to influence Kenya's domestic politics.¹²⁴ These unsubstantiated stories would report that foreign officials, including the U.S. ambassador to Kenya, and Office of the Prosecutor personnel would recruit and bribe witnesses to testify against the defendants.¹²⁵ Kenyatta and Ruto's supporters supplemented this more formal media coverage with social media campaigns aimed at discrediting the ICC and civil society groups, "pseudo blogs," and "paid for propaganda" designed to bolster support for the defendants.¹²⁶

D. Dismissal of Charges

In December 2013, after losing two key witnesses against Kenyatta—one who was no longer willing to testify and one who confessed to giving false evidence—Prosecutor Bensouda requested an adjournment of the trial date to allow for additional investigation.¹²⁷ The Trial Chamber granted the

121. Statement, Int'l Crim. Ct., Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Status of the Government of Kenya's Cooperation with the Prosecution's Investigations in the Kenyatta Case (Dec. 4, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014> [hereinafter Prosecutor Statement on Status of Kenya's Cooperation].

122. See Statement, Int'l Crim. Ct., Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding Trial Chamber's Decision to Vacate Charges Against Messrs William Samoei Ruto and Joshua Arap Sang Without Prejudice to Their Prosecution in the Future (Apr. 6, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406> [hereinafter Prosecutor Statement on Ruto Decision]; Catrina Stewart, *ICC on Trial Along with Kenya's Elite Amid Claims of Bribery and Intimidation*, GUARDIAN (Oct. 1, 2013), <https://www.theguardian.com/world/2013/oct/01/icc-trial-kenya-kenyatta-ruto> (reporting that at least a dozen witnesses who were scheduled to testify had been bribed or pressured to withdraw their testimonies).

123. Prosecutor Statement on Status of Kenya's Cooperation, *supra* note 121.

124. See Sungi, *supra* note 62, at 154–55.

125. *Id.* at 155.

126. Archangel Byaruhanga Rukooko & Jon Silverman, *The International Criminal Court and Africa: A Fractious Relationship Assessed*, 19 AFR. HUM. RTS. L.J. 85, 92 (2019).

127. Statement, Int'l Crim. Ct., Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following an Application Seeking an Adjournment of the Provisional Trial Date (Dec. 19, 2013), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-19-12-2013&ln=en>; see also Prosecutor v. Kenyatta, Case No. ICC-01/09-01/11, Notification of

adjournment, and in October 2014, the Prosecutor requested a second, indefinite adjournment due to insufficient evidence resulting from Kenya's sustained lack of cooperation.¹²⁸ Despite the Prosecutor's claims that Kenya, under Kenyatta's direction, failed to comply with multiple requests for assistance issued by the ICC, the Trial Chamber rejected the Prosecutor's request for an indefinite adjournment and ordered the Prosecutor to file a notice either withdrawing charges or indicating that the evidence justified proceeding to trial.¹²⁹ In its decision, the Trial Chamber specifically noted that the Prosecutor lacked any "concrete prospect of obtaining evidence sufficient to meet the standard for trial and to sustain the current charges."¹³⁰ It further placed the blame for the lack of evidence on the Prosecutor, reasoning that Prosecutor Bensouda should have made greater efforts to verify the credibility and reliability of her evidence and "more vigorously pursued" the issue of Kenya's non-compliance at the early stages of the investigation.¹³¹

The Prosecutor complied with the Trial Chamber's decision by filing a formal notice of her withdrawal of charges against Kenyatta on December 5, 2014,¹³² which was subsequently confirmed by the Trial Chamber.¹³³ The Trial Chamber's decision specifically noted that the charges would be dismissed without prejudice, permitting the Prosecutor to refile in the future, should she obtain sufficient evidence to support the charges.¹³⁴ In publicly justifying the withdrawal of charges, Prosecutor Bensouda clarified that her decision was based purely on lack of evidence, largely stemming from witness tampering and Kenya's lack of cooperation.¹³⁵ Yet, there is little question that political pressures, specifically those exerted by Kenyatta's propaganda campaign, influenced her decision. As scholar and blogger Mark

the Removal of a Witness from the Prosecution's Witness List and Application for an Adjournment of the Provisional Trial Date, ¶¶ 1–2 (Dec. 19, 2013), <https://www.scribd.com/document/192710288/Notification-of-the-removal-of-a-witness-from-the-Prosecution-s-witness-list-and-application-for-an-adjournment-of-the-provisional-trial-date>.

128. Prosecutor v. Kenyatta, Case No. ICC-01/09-01/11, Decision on Prosecution's Application for a Further Adjournment, ¶ 17 (Mar. 13, 2015) [hereinafter Decision on Prosecution's Application for a Further Adjournment].

129. *Id.* at 26.

130. *Id.* ¶ 49.

131. *Id.* ¶¶ 51–52.

132. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta (Dec. 5, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09939.PDF.

133. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on the Withdrawal of Charges Against Mr. Kenyatta, 6 (Mar. 13, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_02842.PDF.

134. *Id.* ¶ 9.

135. Statement, Int'l Crim. Ct., Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhur Muigai Kenyatta (Dec. 5, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2>.

Kersten points out, even if Bensouda's decision was not grounded in political considerations, it was publicly "perceived as political."¹³⁶

The Prosecution fared similarly in the case against Deputy President Ruto. Despite significant evidentiary issues, the case proceeded to trial in September 2013.¹³⁷ After 157 days of trial, the Prosecution closed its case in September 2015.¹³⁸ Subsequently, Ruto's defense team filed for a judgment of acquittal,¹³⁹ and on April 5, 2016, the Trial Chamber, by a majority decision, vacated the charges against Ruto and discharged him from prosecution.¹⁴⁰ Notably, the decision did not serve as an acquittal, as the defense requested, but simply dropped the charges without prejudice to future prosecution.¹⁴¹ In separately authored opinions, the three majority judges agreed that the Prosecution failed to present sufficient evidence for a reasonable Trial Chamber to determine Ruto's guilt.¹⁴² In his opinion, Judge Eboe-Osuji spoke at length regarding the role of Kenya's propaganda war in the Trial Chamber's decision.¹⁴³ He recognized the "openly aggressive campaign"¹⁴⁴ leveled by Kenyan leaders, which included "witness interference at a disturbing scale," that was:

[B]olstered and accentuated by an atmosphere of intimidation, fostered by the withering hostility directed against these proceedings by important voices that generate pressure within Kenya at the community or national levels or both. Prominent among those were voices from the executive and legislative branches of the Govern-

136. Mark Kersten, *What a Mess: ICC Prosecutor Seeks Delay in Kenyatta Trial*, JUST. CONFLICT (Dec. 19, 2013), <https://justiceinconflict.org/2013/12/19/what-a-mess-icc-prosecutor-seeks-delay-in-kenyatta-trial/> (referring to Bensouda's initial decision to request an adjournment of the trial date).

137. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of: Decision on Defence Applications for Judgments of Acquittal, ¶ 4 (Apr. 5, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04384.PDF [hereinafter Ruto Decision on Judgments on Applications for Judgments of Acquittal]. Ruto's case was tried jointly with the case against Joshua Sang.

138. Press Release, Int'l Crim. Ct., Ruto and Sang Case: ICC Trial Chamber V(A) Terminates the Case Without Prejudice to Re-Prosecution in Future (Apr. 5, 2016), [https://www.icc-cpi.int/pages/item.aspx?name=pr1205#:~:text=5%20April%202016-,Ruto%20and%20Sang%20case%3A%20ICC%20Trial%20Chamber%20V\(A\),to%20re%2Dprosecution%20in%20future&text=According%20to%20the%20majority%2C%20this,may%20be%20subject%20to%20appeal.](https://www.icc-cpi.int/pages/item.aspx?name=pr1205#:~:text=5%20April%202016-,Ruto%20and%20Sang%20case%3A%20ICC%20Trial%20Chamber%20V(A),to%20re%2Dprosecution%20in%20future&text=According%20to%20the%20majority%2C%20this,may%20be%20subject%20to%20appeal.)

139. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of "Corrigendum of Ruto Defence Request for Judgment of Acquittal" (Oct. 26, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_20293.PDF.

140. Ruto Decision on Judgments on Applications for Judgments of Acquittal, *supra* note 137, at 1.

141. *Id.*

142. Ruto Decision on Judgments on Applications for Judgments of Acquittal, *supra* note 137.

143. *See id.* ¶¶ 138–194.

144. *Id.* ¶ 146.

ment. It was plainly wrong for them to bring such voices to bear in the course of an ongoing criminal trial.¹⁴⁵

Nevertheless, Judge Eboe-Osuji refused to allow the propaganda war to result in an acquittal, as Kenyatta and Ruto had requested, noting that “an acquittal in this case could never have resulted from political pressure.”¹⁴⁶ While he recognized that the leaders’ political campaign and affiliated conduct towards witnesses directly impeded the Prosecutor’s ability to present her case, he made clear that “extra-judicial conducts, campaigns or demands could not influence the Chamber to acquit or convict the accused” and that nothing other than the evidence itself would influence the Chamber’s decision.¹⁴⁷ Instead, Judge Eboe-Osuji specifically noted that the Prosecution retains the right to re-prosecute the case and reiterated that “political intervention does not work.”¹⁴⁸ Following the Trial Court’s decision, Prosecutor Bensouda issued a statement in which she attributed the case’s demise to erosion by a “‘perfect storm’ of witness interference and intense politicization of the Court’s legal mandate and work.”¹⁴⁹ Of the Trial Chamber’s decision to vacate charges against Ruto but not acquit him, Prosecutor Bensouda said it sent the “strong message” that “witness interference and perverting the cause of justice will not be tolerated at the ICC.”¹⁵⁰

E. Impact

Through tactile political maneuverings, Kenyatta and Ruto were able to label the ICC as a tool of the imperial west intervening in the affairs of African nations.¹⁵¹ Despite Prosecutor Bensouda’s optimistic takeaway from the Trial Chamber decision and Judge Eboe-Osuji’s firm stance that the ICC would not be swayed by political influence or propaganda, there is little question that the Kenyan propaganda campaign successfully prompted the Trial Chamber’s dismissal of charges against both Kenyatta and Ruto. By swaying public opinion within Kenya and throughout the African Union, Kenyatta and Ruto were able to justify a sustained campaign of non-cooperation and non-compliance that ultimately led to their victory over the ICC charges.

The immediate impact of the failed Kenya cases was devastating. Two high-profile defendants, along with four other defendants charged within the Situation in Kenya, for whom there existed a strong *prima facie* case of

145. *Id.* ¶¶ 140–142.

146. *Id.* ¶ 149.

147. *Id.* ¶¶ 141–142, 145.

148. *Id.* ¶¶ 149, 464.

149. Prosecutor Statement on Ruto Decision, *supra* note 122.

150. *Id.*

151. See Michela Wrong, *Argument: Has Kenya Destroyed the ICC?*, FOREIGN POL’Y (July 15, 2014), <https://foreignpolicy.com/2014/07/15/has-kenya-destroyed-the-icc/#>.

crimes against humanity,¹⁵² were able to defeat charges and escape without serious consequence. In fact, Kenyatta and Ruto ultimately benefited from the charges, as political science experts credited their propaganda campaign against the ICC as a primary reason for their success in the 2013 election.¹⁵³ At the time of publication, Kenyatta and Ruto continue to serve in their respective roles as President and Deputy President of Kenya,¹⁵⁴ and to date, the Prosecutor has not refiled charges against either defendant.¹⁵⁵ The Prosecutor's failure to prevail on charges against either defendant significantly undermined the credibility and competency of not just the Office of the Prosecutor, but the ICC more generally.¹⁵⁶ Moreover, the defendants' long-running propaganda war succeeded in painting a lasting and vivid portrayal of the ICC as a biased and racist institution.

Since there was a possibility that the Prosecutor could refile charges against both men, Kenyatta and Ruto continued their propaganda war against the ICC even after charges were dismissed.¹⁵⁷ In early 2016, Kenyatta, who by then had earned the media's title as the ICC's "chief tormentor,"¹⁵⁸ made a speech to the A.U. in which he called for a "roadmap for withdrawal" for African States Parties from the Rome Statute.¹⁵⁹ Amidst

152. See Alastair Leithead, *Dismissal of Case Against Kenya's Ruto Huge Blow to ICC*, BBC NEWS (Apr. 5, 2016), <https://www.bbc.com/news/world-africa-35974172>.

153. See Courtney Hillebrecht, *International Criminal Accountability and the Domestic Politics of Resistance: Case Studies from Kenya and Lebanon*, 54 L. & SOC'Y REV. 453, 477–78 (2020) (arguing that Kenyatta and Ruto's handling of the ICC charges contributed to their electoral victory).

154. *Executive Office of the President*, PRESIDENT KENYA, <https://www.president.go.ke/presidency/> (last visited Jan. 5, 2021); *Office of the Deputy President*, PRESIDENT KENYA, <https://www.president.go.ke/office-of-the-deputy-president/> (last visited Jan. 5, 2021).

155. However, the Kenya Situation remains open before the ICC. *Situations Under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situation.aspx> (last visited Sept. 17, 2020).

156. Simon Allison, *Think Again: How to Beat the ICC – Lessons from the Kenyatta Case*, INST. FOR SEC. STUD., <https://issafrica.org/amp/iss-today/think-again-how-to-beat-the-icc-lessons-from-the-kenyatta-case> (last visited Sept. 17, 2020); see also Hillebrecht, *supra* note 153, at 477.

157. For instance, in October 2014, in a speech to the UN General Assembly, Kenya's ambassador to the UN reiterated the neo-colonialist narrative by arguing that the ICC is being manipulated by "a pernicious group of countries," who possess great power "mostly born of an imperialist and colonial adventure." Dutton, *Enforcing the Rome Statute*, *supra* note 78, at 25; *Kenya's United Nations Envoy Launches Stinging Attack on ICC*, CITIZEN (Nov. 2, 2014), <https://www.thecitizen.co.tz/news/africa/Kenya-s-United-Nations-envoy-launches-stinging-attack-on-ICC/3302426-2507942-7891xoz/index.html>. Likewise, around the same time, Kenyatta publicly vowed never to ever again cooperate with the ICC. Lugano, *supra* note 89, at 21.

158. Ed Croyley, *ICC's Toughest Trial: Africa vs. 'Infamous Caucasian Court'*, REUTERS (Oct. 28, 2016), <https://br.reuters.com/article/us-africa-icc/iccs-toughest-trial-africa-vs-infamous-caucasian-court-idUSKCN12S1U3>.

159. *Id.*; Batram S. Brown, *The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit*, 31 TEMP. INT'L & COMP. L.J. 145, 166 (2017).

other controversies, such as the ICC's indictment of then-Sudanese President Omar al-Bashir,¹⁶⁰ the A.U. adopted Kenyatta's proposal, and in 2017, issued a non-binding resolution encouraging a withdrawal of African States Parties from the Rome Statute.¹⁶¹ Although the proposed mass withdrawal never materialized, it did prompt South Africa—albeit temporarily¹⁶²—and Burundi to formally withdraw from the Rome Statute.¹⁶³ Moreover this large-scale threat of withdrawal presented such a critical legitimacy disaster for the ICC that scholars began considering the “serious risk” that the ICC could “fall apart entirely.”¹⁶⁴

The ICC has not fallen apart, but it does still live in the shadow of Kenya's propaganda wars. While the ICC achieved significant achievements in convicting several other defendants between 2016 and 2019, Prosecutor Bensouda herself admits that these were overshadowed by the failures in and aftermath of the Kenya cases.¹⁶⁵ Moreover, the ICC still remains “a toxic brand in much of Africa,”¹⁶⁶ and allegations of anti-African bias continue to plague the ICC.¹⁶⁷

160. Priya Pillai, *The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability*, AM. SOC'Y INT'L L.: INSIGHTS (Aug. 22, 2018), <https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court> (explaining the fraught A.U.-ICC relationship is due in part to the ICC's indictment of Al-Bashir and its repeated calls for his arrest).

161. Draft Withdrawal Strategy Document Afr. Union Ver. 12.01.2017 (Dec. 1, 2017), https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf; see also S.J. Tilden, *Africa's Conflict with the International Criminal Court: The African Court of Justice and Human and Peoples' Rights as an Alternative to the ICC*, 27 TUL. J. INT'L & COMP. L. 201, 201 (2018).

162. While South Africa initiated withdrawal proceedings, it ultimately revoked its decision to withdraw following a decision by a South African High Court that deemed the withdrawal “unconstitutional and invalid.” Hannah Woolaver, *Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court*, 111 AM. J. INT'L L.: UNBOUND 450, 450–51 (2018).

163. Burundi formally withdrew from the Rome Statute on October 27, 2017. *Burundi*, INT'L CRIM. CT., <https://www.icc-cpi.int/burundi> (last visited Sept. 17, 2020). The Gambia also indicated that it would withdraw, but it “reverse[d] course almost immediately after a newly elected government assumed power.” Franck Kuwonu, *ICC: Beyond the Threats of Withdrawal*, UN AFR. RENEWAL (May–July 2017), <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>.

164. Galand, *supra* note 10, at 934.

165. INT'L CRIM. CT. OFF. OF THE PROSECUTOR, STRATEGIC PLAN 2019–2020, at 11 (July 17, 2019), <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> [hereinafter [hereinafter ICC PROSECUTOR 2019-2021 STRATEGIC PLAN]].

166. Michela Wrong, *supra* note 151 (quoting John Ryle of the Rift Valley Institute think tank).

167. See Kamari Maxine Clarke, *Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality*, JUST SEC. (Jul. 24, 2020), <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/> (alleging that the ICC's “particular notion of justice

Possibly the most devastating legacy of the Kenya cases is that they paved the way for future propaganda wars against the ICC. Kenyatta and Ruto's propaganda war and corresponding non-compliance created a roadmap for states to use against future contested ICC charges.¹⁶⁸ Kenyatta and Ruto showed the world that the way to defeat the ICC was through a combination of militarizing public opinion and obstructionism. A few years after the charges against Kenyatta and Ruto were dismissed, the United States leaders used this exact roadmap in efforts to avoid similar charges.

IV. THE UNITED STATES & THE INVESTIGATION INTO AFGHANISTAN

Since its creation, one of the ICC's greatest weaknesses has been the lack of support from the world's biggest superpower, the United States. Unlike Kenya, the United States is not and never has been a State Party to the ICC. The ICC has long endured a turbulent relationship with the United States, which has varied based on the presidential administration in power.¹⁶⁹ However, even under George W. Bush, a president whose administration was stridently against the ICC's mission,¹⁷⁰ the United States never actively undermined ongoing ICC operations. This state of affairs changed drastically under Former President Trump with Prosecutor Bensouda's *proprio motu* investigation into Afghanistan.

A. Request for Investigation & Subsequent Backlash

Since the 1970s, Afghanistan has endured a prolonged period of unrest.¹⁷¹ The country was torn apart by a series of civil wars, which ultimately invited international participation and culminated in the U.S. invasion of

has caused it to reproduce deep, global structural inequalities" and specifically noting that of the forty-two indictments issued by the ICC, all were for black or Arab-Africans).

168. Allison, *supra* note 156 ("Thanks to Kenyatta, there is now a proven template for evading international justice.").

169. See generally Leila Nadya Sadat & Mark A. Drumbl, *The United States and the International Criminal Court: A Complicated, Uneasy, Yet at Times Engaging Relationship*, 2–8 (Wash. U. St. Louis Legal Stud. Rsch. Paper Series, 2016), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1504&context=wlufac> (tracing the history of U.S. involvement in and relationship with the ICC under the Clinton, Bush, and Obama administrations).

170. See Milena Sterio, *The International Criminal Court: Current Challenges and Prospect of Future Success*, 52 CASE W. RES. J. INT'L L. 467, 473–74 (2020) (stating that "the ICC had a difficult relationship with the United States during the George W. Bush administration).

171. See Abdul Mahir Hazim, *Toward Cooperation Between Afghanistan and the International Criminal Court*, 49 GEO. WASH. INT'L L. REV. 615, 617 (2017) (noting that between 1978 and 2003, all parties to conflicts in Afghanistan have committed war crimes, crimes against humanity, and human rights violations).

Afghanistan following the September 11 terrorist attacks.¹⁷² During this invasion, named “Operation Enduring Freedom,” American troops sought to defeat Al Qaeda and the Taliban-run Government.¹⁷³ As part of the mission, U.S. troops armed and trained Afghan anti-Taliban groups, which ultimately succeeded in ousting the Taliban from power.¹⁷⁴ Following the fall of the Taliban, the security situation within the country remained dire, with dangerous levels of insurgency and the increased prevalence of terrorist groups such as the Haqqani Network and ISIS.¹⁷⁵

During Operation Enduring Freedom, the U.S. military detained suspected Al-Qaeda and Taliban members both within Afghanistan and at Central Intelligence Agency (“CIA”)-operated “black site” prisons in other nations.¹⁷⁶ As confirmed through Congressional reports, the CIA engaged in government-approved torture of these detainees.¹⁷⁷ The CIA “torture program” provided for the use of “enhanced interrogation techniques”¹⁷⁸ against captured suspected Taliban members by controversially labeling them as “enemy combatants,” rather than prisoners of war, thereby depriving them of many of the significant protections afforded by the Geneva Conventions.¹⁷⁹

In 2006, under Prosecutor Moreno Ocampo, the ICC Office of the Prosecutor opened a *proprio motu* preliminary examination into alleged atrocity

172. See *Afghanistan*, COAL. FOR INT’L CRIM. CT., <http://www.coalitionfortheicc.org/country/afghanistan> (last visited Sept. 7, 2020).

173. Situation in the Islamic Republic of Afghanistan, Case No. ICC_02/17, Public Redacted Version of “Request for Authorisation of an Investigation Pursuant to Article 15”, 20 November 2017, ICC_02/17-7-Conf-Exp, ¶ 15, https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF [hereinafter Request for Authorisation of Investigation].

174. *Id.*

175. Request for Authorisation of Investigation, *supra* note 173, ¶¶ 18–19.

176. See Margaret L. Satterthwaite, *De-Torturing the Logic: The Contribution of CAT General Comment 2 to the Debate over Extraordinary Extradition*, 11 N.Y. CITY L. REV. 281, 281–82 (2008) (estimating that at least three dozen individuals have been held in secret prisons known as CIA “black sites”); see also Request for Authorisation of Investigation, *supra* note 173, ¶ 189 (alleging that U.S. armed forces committed crimes against at least twenty-four detainees both in Afghanistan and in other States Parties, “namely Poland, Romania and Lithuania” between 2003 and 2004).

177. See generally *Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* (Dec. 9, 2014), <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>; see also Request for Authorisation of Investigation, *supra* note 173, ¶ 193 (listing the specific alleged acts used by CIA officials against detainees).

178. *Enhanced Interrogation Explained*, HUM. RTS. FIRST (Feb. 2016), <https://www.humanrightsfirst.org/sites/default/files/Enhanced-Interrogation-Fact-Sheet.pdf> (detailing the practices that constituted “enhanced interrogation techniques” and their unlawfulness under international law).

179. Peter Jan Honigsberg, *Chasing “Enemy Combatants” and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT’L L. & FOREIGN AFF. 1, 5 (2007).

crimes committed in Afghanistan.¹⁸⁰ Minimal progress was made in the investigation until over a decade later, largely because of security concerns and the Prosecutor's inability to secure cooperation from stakeholders in the investigation.¹⁸¹ However, in November 2017, as required to move forward with a *proprio motu* investigation pursuant to article 15,¹⁸² Prosecutor Fatou Bensouda filed a formal request with Pre Trial Chamber III to open an investigation into alleged war crimes and crimes against humanity committed in Afghanistan since May 1, 2003, as well as closely linked crimes committed in other States Parties' territories since July 1, 2002.¹⁸³ The scope of this proposed investigation encompassed three general categories of alleged crimes:

- (1) Crimes against humanity and war crimes by the Taliban and their affiliated Haqqani Network;
- (2) War crimes by the Afghan National Security Forces ... [;] and
- (3) War crimes by members of U.S. armed forces on the territory of Afghanistan, and by members of the U.S. CIA in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004.¹⁸⁴

With regard to the third category of crimes encompassed in the proposed investigation, in her request, Bensouda acknowledged that the evidence acquired in her preliminary examination provided a reasonable basis to find that U.S. armed forces engaged in war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence.¹⁸⁵ In response to Prosecutor Bensouda's request, the United States went on the offensive, launching a disinformation and anti-ICC propaganda campaign before the media. This charge was largely led by National Security Advisor John Bolton, until he was fired from the Trump Administration in 2019.¹⁸⁶ Bolton is arguably the politician who boasts the most strident anti-ICC history. As the U.S. Ambassador to the United Nations under President George W. Bush, Bolton famously cited his "happiest mo-

180. Request for Authorisation of Investigation, *supra* note 173, ¶ 22.

181. Request for Authorisation of Investigation, *supra* note 173, ¶ 24.

182. Rome Statute, *supra* note 5, art. 15.

183. Request for Authorisation of Investigation, *supra* note 173, ¶ 187.

184. Statement, Int'l Crim. Ct., The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan (Nov. 20, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>.

185. Request for Authorisation of Investigation, *supra* note 173, ¶ 187.

186. Peter Baker, *Trump Ousts John Bolton as National Security Advisor*, N.Y. TIMES (Sept. 10, 2019), <https://www.nytimes.com/2019/09/10/us/politics/john-bolton-national-security-adviser-trump.html>.

ment” as notifying the U.N. that the U.S. had symbolically “unsigned the Rome Statute.”¹⁸⁷

On September 10, 2018, John Bolton used a speech to the Federalist Society in Washington, D.C. to make a “major announcement” on U.S. policy towards the ICC.¹⁸⁸ Bolton opened his address by chiding the ICC for being “ineffective, unaccountable, and indeed outright dangerous,” and noting that while its theoretical aim is to hold atrocity perpetrators accountable, in actuality, its central aim is to “constrain the United States.”¹⁸⁹ He then stated that the U.S. would “let the ICC die on its own,” since “for all intents and purposes, the ICC is already dead to us.”¹⁹⁰ Bolton closed his speech with a “pledge to the American people,” that he would take specific actions to respond to any future attempts to investigate the U.S., Israel, or its allies, in which he threatened ICC personnel with sanctions and potential criminal prosecution and warned any nations that chose to cooperate with the ICC that their cooperation would detrimentally affect future U.S. foreign or military assistance.¹⁹¹

Bolton’s hyperbolic speech sent a clear message. Not only was this intended to bully the ICC and its Prosecutor into keeping their hands off American sovereignty and American nationals, but this speech, given at a high-profile event with press present, was meant to convey a louder global message that America is more powerful than any international court. As John Bellinger noted, rather than engaging the ICC in “quiet diplomacy,” the Trump Administration chose to “[throw] down the gauntlet in public.”¹⁹² And not only was Bolton’s speech hawkish and hyperbolic, but it also served as a means of spreading disinformation. Most importantly, Bolton repeatedly exaggerated the scope of ICC jurisdiction, boldly asserting without justification that the ICC seeks to apply universal jurisdiction and that it would try to prosecute U.S. officials for the crime of aggression, which are, in actuality, procedural impossibilities under the text of the Rome Statute.¹⁹³

187. John B. Bellinger III, *International Law and the Foreign Affairs Challenges for the Next Administration*, 48 GEO. J. INT’L L. 909, 913 (2017); Letter from John R. Bolton, Under Sec’y of State for Arms Control and Int’l Sec., to Kofi Annan, U.N. Sec’y Gen. (May 6, 2002), <https://2001-2009.state.gov/t/pa/prs/ps/2002/9968.htm>.

188. *Full Text of John Bolton’s Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html> [hereinafter *Bolton Speech to Federalist Society*].

189. *Id.*

190. *Id.*

191. *Id.*

192. John Bellinger, *The Trump Administration Throws Down the Gauntlet to the ICC. The Court Should Decline the Challenge*, LAWFARE (Sept. 10, 2018, 11:50 PM), <https://www.lawfareblog.com/trump-administration-throws-down-gauntlet-icc-court-should-decline-challenge>; Jean Galbraith, *Trump Administration Expresses Strong Disapproval of the International Criminal Court*, 113 AM. J. INT’L L. 169, 172 (2019).

193. Alex Whiting, *Why John Bolton vs. Int’l Criminal Court 2.0 is Different from Version 1.0*, JUST SEC. (Sept. 10, 2018), <https://www.justsecurity.org/60680/international->

Some commentators questioned the validity of Bolton's threats, with many doubting the existence of any federal U.S. law that would allow for criminal prosecution of court officials.¹⁹⁴

This speech was the first step in a prolonged anti-ICC publicity and disinformation campaign initiated by the Trump Administration. In his speech to the U.N. General Assembly in late September 2018, President Trump referred to the ICC as "having no jurisdiction, no legitimacy, and no authority" in the eyes of the United States, and echoed Bolton's falsehoods that the ICC "claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process."¹⁹⁵ Then, on April 5, 2019, following Secretary of State Mike Pompeo's announcement that he would impose visa restrictions on ICC personnel intending to travel to the U.S. for the investigation,¹⁹⁶ the United States revoked the entry visa for Prosecutor Bensouda and threatened to take additional steps, including imposing economic sanctions, if the ICC continued its investigation.¹⁹⁷

B. Pre-Trial Chamber Decision & Global Response

The Pre-Trial Chamber's approval of Prosecutor Bensouda's request for an investigation was widely anticipated, and as one scholar noted, "a near certainty."¹⁹⁸ Yet, in what many found to be a surprise decision,¹⁹⁹ on April 12, 2019, the three-judge Pre-Trial Chamber III issued a unanimous opinion rejecting Prosecutor Bensouda's request to proceed with the investigation.²⁰⁰ Under Rome Statute article 15, if the ICC Prosecutor concludes that there is

criminal-court-john-bolton-afghanistan-torture/; David Bosco, *Bolton Barked at the ICC, But With How Much Bite?*, LAWFARE (Sept. 11, 2018, 2:01 PM), <https://www.lawfareblog.com/bolton-barked-icc-how-much-bite>.

194. Bellinger, *supra* note 192 (noting that he is "not aware of any federal criminal statute that could be used to charge ICC judges or prosecutors").

195. Donald Trump, U.S. President, Remarks by President Trump to the 73rd Session of the United Nations General Assembly (Sept. 25, 2018), <https://usoas.usmission.gov/remarks-by-president-trump-to-the-73rd-session-of-the-united-nations-general-assembly-new-york-ny/>.

196. Lesley Wroughton, *U.S. Imposes Visa Bans on International Criminal Court Investigators - Pompeo*, REUTERS (Mar. 15, 2019), <https://www.reuters.com/article/uk-usa-icc/u-s-imposes-bans-on-international-criminal-court-investigators-pompeo-idUSKCN1QW1ZH>.

197. 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>.

198. Bosco, *supra* note 193.

199. Patryk I. Labuda, *A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court's Afghanistan Decision*, EJIL: TALK! (Apr. 13, 2019), <https://www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/>.

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

a “reasonable basis” to proceed with an investigation *proprio motu*, she must request authorization from the Pre-Trial Chamber.²⁰¹ As the Pre-Trial Chamber itself recognized, “reasonable basis” is the lowest evidentiary standard in the ICC’s statutory framework.²⁰² Article 53 provides the Prosecutor with additional insight into determining whether a “reasonable basis” exists to open an investigation and outlines the following considerations:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.²⁰³

Article 15 further provides:

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation[.]²⁰⁴

In its decision, the Pre-Trial Chamber recognized its “duty and responsibility to conduct a scrutiny on all of the evaluations that have led the Prosecutor to apply for an authorisation to investigate, including those pertinent to the prospects of an investigation.”²⁰⁵ It then proceeded to review the Prosecutor’s evaluations of the three considerations in article 53: jurisdiction, admissibility, and whether an investigation would not serve “the interests of justice.”²⁰⁶ The Pre-Trial Chamber agreed that Prosecutor Bensouda’s proposed investigation met the jurisdictional and admissibility requirements of the Rome Statute but ultimately determined that it would not further the interests of justice.²⁰⁷ The Pre-Trial Chamber largely rested this determination on its finding that the investigation had already met “severe constraints and challenges” and that the “complexity and volatility of the political climate still surrounding the Afghan scenario” made prospects of securing future “meaningful cooperation from relevant authorities” unlikely.²⁰⁸

201. Rome Statute, *supra* note 5, art. 15(3).

202. Pre-Trial Decision on Authorization, *supra* note 200, ¶ 31.

203. Rome Statute, *supra* note 5, art. 53(1).

204. Rome Statute, *supra* note 5, art. 15(4).

205. Pre-Trial Decision on Authorization, *supra* note 200, ¶ 44.

206. *Id.* ¶¶ 45–96

207. *Id.* ¶ 87.

208. *Id.* ¶¶ 44, 94. The Pre-Trial Chamber also recognized that interests of justice would be undermined by the long delay between the crimes, which largely occurred between 2005

While the Pre-Trial Chamber's decision was warmly received by the Trump Administration,²⁰⁹ it sparked new backlash from scholars, practitioners, and governments of States Parties.²¹⁰ It portrayed the ICC as a weak institution willing to bend to political pressures exerted by superpowers. It also rewarded obstructionism and welcomed new attacks on the court, recognizing that if states refused to cooperate with investigations, there would be a greater likelihood that such investigations would fail to move forward.²¹¹ In authoring an opinion viewed as controversial only among ICC supporters, the Pre-Trial Chamber embroiled the ICC in a greater political battle, essentially providing the ICC the ability to avoid being forced to rule on controversial and highly political issues stemming from U.S. liability for atrocity crimes. Scholar Jed Odermatt has recognized the proclivity of international courts that are predisposed to politics, such as the International Court of Justice, and the Court of Justice of the European Union, to dispose of or decline to hear cases that would put the court in a sensitive position to resolve a controversial political issue.²¹² The ICC's Pre-Trial Chamber's decision to reject Prosecutor Bensouda's request for an investigation on procedural grounds, and specifically on the relatively low-profile "interests of

and 2015 and the investigation, as well as the significant amounts of resources the investigation would require. *Id.* ¶¶ 93, 95.

209. Carol Morello, *Trump Administration Applauds International Court's Decision to Abandon Afghan War Crimes Probe*, WASH. POST (Apr. 12, 2019), https://www.washingtonpost.com/world/national-security/trump-administration-applauds-international-courts-decision-to-abandon-afghan-war-crimes-probe/2019/04/12/610fd2b6-5d4a-11e9-a00e-050dc7b82693_story.html (referencing a Presidential statement labeling the decision "a major international victory, not only for [American] patriots, but for the rule of law").

210. See, e.g., *Afghanistan: ICC Refuses to Authorize Investigation, Caving into USA Threats*, AMNESTY INT'L (Apr. 12, 2019), <https://www.amnesty.org/en/latest/news/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats/> (opining that the decision "marks a shocking abandonment of victims and will further weaken the court's credibility"); Christian De Vos, *No ICC Investigation in Afghanistan: A Bad Decision with Big Implications*, INT'L JUST. MONITOR (Apr. 15, 2019), <https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/> (noting that the decision "surprised and angered many"); Kevin Jon Heller, *One Word for the PTC on the Interests of Justice: Taliban*, OPINIOJURIS (Apr. 13, 2019) (recognizing that the Pre-Trial Chamber's decision not only blocked an investigation into the United States, but also precluded investigations and prosecutions of Taliban officials responsible for heinous crimes, leaving their victims without justice); *ICC: Judges Reject Afghanistan Investigation*, HUM. RTS. WATCH (Apr. 12, 2019), <https://www.hrw.org/news/2019/04/12/icc-judges-reject-afghanistan-investigation>.

211. See *ICC: Judges Reject Afghanistan Investigation*, *supra* note 210; David Luban, *The "Interests of Justice" at the ICC: A Continuing Mystery*, JUST SEC. (Mar. 17, 2020) <https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/> (arguing that "it seems perverse to reward obstruction, and even more perverse to relabel defeat as 'serving' the interests of justice").

212. Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 INT'L J.L. CONTEXT, 221, 227 (2018) (also recognizing that another strategy used by international courts is to "decide a case, but to do so in a manner that avoids the most politically sensitive parts of the case").

justice” language, which many ICC experts believed plays little role in determining whether to open investigations,²¹³ exemplifies the political avoidance that Odermatt so deftly attributes to other international courts.

And while the Pre-Trial Chamber’s opinion is notably absent of language referring to the United States’ propaganda campaign against the ICC, the circumstances surrounding the decision strongly imply that the Pre-Trial Chamber’s rejection was the product of U.S. pressures. For example, the decision took seventeen months for the Pre-Trial Chamber to issue, which, as critics have noted, was extensive for a relatively short and straightforward analysis.²¹⁴ The decision was also issued on April 12, 2019, exactly a week after Pompeo revoked the prosecutorial team’s travel visas.²¹⁵ Even more clearly, the Pre-Trial Chamber departed from its traditional approach of removing all political considerations from its opinion,²¹⁶ choosing instead to openly acknowledge the “complexity and volatility of the political climate” surrounding the crimes under investigation.²¹⁷

C. Trial Chamber Decision & Resulting Sanctions

In the midst of the backlash to the Pre-Trial Chamber’s decision, Prosecutor Bensouda and the legal representatives of eighty-two victims separately appealed the rejection of her request for authorization.²¹⁸ On March 2020, the Trial Chamber issued its judgment amending the Pre-Trial Chamber’s decision and authorizing Bensouda to:

[C]ommence an investigation ‘in relation to alleged crimes committed on the territory of Afghanistan in the period 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 and were committed on the territory of other States Parties in the period since 1 July 2002’.²¹⁹

213. E.g. Labuda, *supra* note 199.

214. *ICC Pre-Trial Chamber Rejects OTP Request to Open an Investigation in Afghanistan: Some Preliminary Thoughts on an Ultra Vires Decision*, SPREADING JAM (Apr. 12, 2019), <https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/>.

215. *See id.*

216. *ICC: Judges Reject Afghanistan Investigation*, *supra* note 210 (noting the Pre-Trial Chamber’s “decision to take political factors into consideration in its decision was unusual”).

217. Pre-Trial Decision on Authorization, *supra* note 200, ¶ 94.

218. Situation in the Islamic Republic of Afghanistan, No. ICC-02/17, Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” (June 7, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03060.PDF; Situation in the Islamic Republic of Afghanistan, No. ICC-02/17 OA, Victims’ Appeal Brief (June 24, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03328.PDF.

219. Situation in the Islamic Republic of Afghanistan, No. ICC-02/17 OA4, Judgment on the appeal against the decision on the authorization of an investigation into the situation in

The Appeals Chamber determined that the Pre-Trial Chamber erred in its interpretation of Rules 15 and 53.²²⁰ The Appeals Chamber specifically found that while the Prosecutor must consider the article 53 considerations in determining whether to request to open an investigation, the Pre-Trial Chamber is only required to determine whether there is “a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed and whether potential case(s) arising from such investigation appear to fall within the Court’s jurisdiction.”²²¹ The Pre-Trial Chamber was *not* intended to second guess the Prosecutor’s analysis of the article 53 considerations, and specifically should not even have analyzed whether the proposed investigation furthered the “interests of justice.”²²²

While ICC supporters welcomed the Trial Chamber’s decision,²²³ the U.S. Government leveled a second wave of propaganda warfare against the ICC. In a White House press conference on the day of the judgment, Secretary Pompeo discredited the ICC as an “unaccountable political institution masquerading as a legal body.”²²⁴ Shortly thereafter, during a State Department press briefing, Secretary Pompeo singled out individual ICC personnel and their family members, noting that the U.S. Government would consider steps to take against them for “putting Americans at risk.”²²⁵ These vague, highly publicized threats continued for months²²⁶ until the anticipated pun-

the Islamic Republic of Afghanistan, pmb. (Mar. 5, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF [hereinafter Afghanistan Judgment on Appeal].

220. Afghanistan Judgment on Appeal, *supra* note 219, ¶ 23.

221. Afghanistan Judgment on Appeal, *supra* note 219, ¶ 34.

222. Afghanistan Judgment on Appeal, *supra* note 219, ¶ 37.

223. See e.g., *ICC Greenlights Afghanistan Investigation*, HUM. RTS. WATCH (Mar. 5, 2020), <https://www.hrw.org/news/2020/03/05/icc-greenlights-afghanistan-investigation> (stating that the decision “gives atrocity victims hope for future justice”); *Afghanistan: ICC Authorizes Historic Investigation*, AMNESTY INT’L (Mar. 5, 2020), <https://www.amnesty.org/en/latest/news/2020/03/afghanistan-icc-authorizes-historic-investigation/> (noting that through this decision, the ICC “reversed a terrible mistake and decided to stand by the victims of war crimes and crimes against humanity”); *CICC Members: Welcome Afghanistan Decision Highlights Need to Protect the ICC*, COAL. FOR INT’L CRIM. CT. (Mar. 16, 2020), <https://www.coalitionfortheicc.org/cicc-members-welcome-Afghanistan-decision#:~:text=CICC%20members%3A%20Welcome%20Afghanistan%20decision%20highlights%20need%20to%20protect%20the%20ICC,-Share%20this%20page&text=On%205%20March%202020%2C%20the,crimes%20against%20humanity%20in%20Afghanistan> (listing Coalition for the International Criminal Court representatives’ comments applauding the Trial Chamber’s decision).

224. *ICC Decision on Afghanistan*, U.S. DEPT. STATE (Mar. 5, 2020), <https://2017-2021.state.gov/icc-decision-on-afghanistan/index.html>.

225. *Secretary Pompeo’s Remarks to the Press*, U.S. DEPT. STATE (Mar. 17, 2020), <https://2017-2021.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/index.html> (naming ICC Prosecutor Fatou Bensouda, Bensouda’s Chef de Cabinet Sam Shomanesh, and Phakiso Mochochoko as individuals driving the investigation into American nationals).

226. E.g. Quint Forgy, *Pompeo Signals Impending Action Against ICC for Investigating Alleged U.S. War Crimes*, POLITICO (June 1, 2020), <https://www.politico.com/news/2020/06/01/mike-pompeo-icc-investigating-us-war-crimes-293673> (explaining how in early June,

ishment came in the form of an Executive Order signed by President Trump on June 11, 2020.²²⁷

The Executive Order opened by explaining the danger the ICC's Afghanistan investigation posed to the United States, noting that the Prosecutor's actions "threaten to infringe upon the sovereignty of the United States and impede the critical national security and foreign policy work of United States Government and allied officials, and thereby threaten the national security and foreign policy work of the United States."²²⁸ The order concluded that this potential threat was sufficient to declare a "national emergency" that warranted the imposition of sanctions.²²⁹ While the order did not actually level sanctions against specific individuals, it laid the legal groundwork for imposing future sanctions against any foreign person determined by the Secretary of State to have directly engaged or materially assisted in the ICC's investigation, arrest, detention, or prosecution of nationals of the U.S. or its allies.²³⁰ These sanctions allowed the U.S. Government to freeze or "block" any of the sanctioned person's property or interests that are located in the United States or which "come within the possession or control of any United States person."²³¹ While it was unclear for several months whether the United States would act on the Executive Order by issuing sanctions or allow it to hang over the ICC as a threat, on September 2, 2020, Secretary Pompeo formally announced the issuance of sanctions pursuant to the Executive Order against Prosecutor Bensouda and Phakiso Mococho, the ICC's Head of Jurisdiction, Complementarity and Cooperation Division.²³²

D. Impact

Unlike with the propaganda war initiated by Kenya, the ICC is only just beginning to feel the impact of the U.S. attack. The authorization and subsequent imposition of sanctions elicited strong criticism of U.S. conduct and an outpouring of support for the ICC from scholars, civil society, and governmental officials.²³³ Notably, in a joint statement, sixty-seven States Par-

Pompeo teased forthcoming governmental action to "push back" against the ICC in an interview on the conservative "What the Hell is Going On" podcast).

227. Executive Order 13928, 85 Fed. Reg. 36,139 (June 11, 2020).

228. *Id.* at 36,139.

229. *Id.* at 36,139.

230. *Id.*

231. *Id.* at 36,139.

232. *Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court*, U.S. DEPT. STATE (Sept. 2, 2020), <https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/index.html>.

233. See, e.g., *Statement of Lawyer and Legal Scholars Against U.S. Sanctions on ICC Investigators of Atrocities*, STAN. L. SCH. (June 2020); <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/07/STATEMENT-OF-LAWYERS-AND-LEGAL-SCHOLARS-AGAINST-U.S.-SANCTIONS-ON-ICC-INVESTIGATORS-OF-ATROCITIES-June->

ties “reconfirm[ed their] unwavering support for the Court as an independent and impartial institution” and reiterated their commitment to defend the ICC “against measures or threats” against it.²³⁴ Yet, it remains unclear what practical impact this acknowledgment of support will have. When faced with standing their ground on support for the ICC or being pressured by the world’s greatest superpower, States Parties are placed between the figurative rock and hard place, and when put in similar predicaments in the past, they have sided with the United States.²³⁵

In January 2021, the United States experienced a shift to a presidential administration led by President Joseph Biden. On April 1, 2021, President Biden issued an Executive Order terminating the “national emergency” referenced in President Trump’s June 2020 Executive Order and lifting the sanctions imposed by the Trump Administration on ICC personnel.²³⁶ However, in doing so, President Biden specifically noted the U.S. Government’s sustained objections to the ICC’s “assertions of jurisdiction over personnel of such non-States Parties as the United States and its allies absent their consent or referral by the United Nations Security Council.”²³⁷ He further maintained that the United States “will vigorously protect current and former United States personnel from any attempts to exercise such jurisdiction.”²³⁸

While the ICC may experience better relations with the United States under the Biden Administration than it did under the Trump Administration, it is highly unlikely that President Biden will return to the levels of coopera-

2020.pdf; *Oppose Trump Administration Measures against the International Court*, HUM. RTS. WATCH (June 11, 2020), https://www.hrw.org/sites/default/files/media_2020/07/2020-07-07%20Oppose%20Trump%20Administration%20Measures%20against%20the%20International%20Criminal%20Court.pdf (statement of a number of non-governmental and civil society organizations, including Human Rights Watch and Amnesty International USA against the United States’ sanctions); *International Criminal Justice: Statement by the High Representative Following the US Decision on Possible Sanctions Related to the International Criminal Court*, EUR. UNION EXTERNAL ACTION SERV. (June 16, 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/80954/international-criminal-justice-statement-high-representative-following-us-decision-possible_en (statement by the European Union High Representative reconfirming the European Union’s “unwavering support” for the ICC in light of U.S. sanctions).

234. *Statement in Support of the International Criminal Court (ICC) Following the Release of the US Executive Order of 11 June 2020*, PERMANENT MISSION FR. (June 23, 2020), <https://onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order>.

235. PARIS, *supra* note 53, at 70–74 (discussing the U.S. Government’s execution of bilateral agreements with 102 nations in which both parties promised not to surrender each other’s nationals to the ICC, many of which were negotiated by the United States under threat of withdrawing foreign aid on which the other nations were dependent).

236. *Executive Order on the Termination of Emergency with Respect to the International Criminal Court*, WHITE HOUSE (Apr. 1, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/01/executive-order-on-the-termination-of-emergency-with-respect-to-the-international-criminal-court/>.

237. *Id.*

238. *Id.*

tion the ICC enjoyed under President Obama in 2008-2015—who publicly ended American hostilities against the ICC and even voted in favor of a Security Council resolution that referred the Libya Situation to the ICC and lobbied other Council members to do the same.²³⁹ At the time of publication, the Prosecutor’s investigation into Afghanistan remains ongoing, and the impact of this investigation on the U.S.-ICC relationship as well as the ICC’s standing on the global stage remains to be seen.

Regardless of what the future holds, the United States, like Kenya, has proven through its campaign of anti-ICC rhetoric and disinformation just how susceptible the ICC is to political pressures and public opinion. Notably, the Trump Administration’s propaganda war has severely impacted the ICC’s perceived legitimacy. Through the Pre-Trial Chamber’s ruling denying the Prosecutor’s request to open an investigation, many were left believing that the ICC could be easily swayed by political pressures exerted by a global superpower. Not only did this promote a perception of the ICC as a weak entity, but it also reiterated a mentality that the ICC will “stay in its lane” and continue to investigate and prosecute only those nations with a weak pull on the geopolitical stage, while avoiding those who can easily solicit global public opinion. Despite the Trial Chamber’s accurate application of the law, suspicions remain whether its ruling reversing the Pre-Trial Chamber and permitting Bensouda’s investigation to proceed was—at least partially—the result of pressures exerted by ICC supporters, including States Parties, following the Pre-Trial Chamber’s denial. This change in position presents the ICC as disconnected and inconsistent and portrays it as easily malleable to public opinion.

Despite the procedural inaccuracies plaguing the Pre-Trial Chamber’s Decision, the Trial Chamber’s approval of the investigation presents another array of practical issues for the Prosecutor and the ICC. Proceeding with an investigation into U.S. crimes, when the U.S. Government has adamantly refused to provide any assistance and has indeed blocked the investigation at every stage, appears to be setting the ICC up for failure. This is especially true considering the success the obstructionist approach earned Kenyatta and Ruto. A failed case against the United States holds the potential to further curtail the ICC’s power and permanently undermine its legitimacy and authority.²⁴⁰ Unfortunately a decision to withdraw from the investigation at this stage would validate the United States’ bully tactics. While a case against U.S. officials would be a huge success for the ICC in terms of achieving justice over impunity and fostering greater respect for the rule of law, the cost of the case—in terms of undermining the ICC’s legitimacy—could be overwhelming.

239. Sara L. Ochs, *The United States, The International Criminal Court, and the Situation in Afghanistan*, 95 NOTRE DAME L. REV. REFLECTION 89, 92 (2019).

240. An investigation into the United States also makes future prospects for Security Council referrals highly unlikely. Sterio, *supra* note 170, at 473.

V. LIMITING THE IMPACT OF PROPAGANDA WARFARE

When asked about his reaction to the U.S. Executive Order authorizing sanctions against the court, ICC President Chile Eboe-Osuji stated, “In any system in which the rule of law is respected, courts are never coerced. They may be criticized—even robustly. But never coerced.”²⁴¹ However, the success of Kenya’s propaganda campaign against the ICC throws Judge Eboe-Osuji’s statement into question. Kenya and its supporters have shown that it is possible, through prolonged and effective use of anti-ICC sentiment and widespread propaganda, to force the ICC’s hand and to dictate its rulings in certain cases. This weakness has translated into the ICC’s perceived bias, which has fundamentally “damaged States Parties’ understandings of the independence and fairness of the ICC.”²⁴² The past success of propaganda also paves the way for future attacks.

The reality is that the ICC is a court fundamentally subject to the will of its States Parties, as well as to the pressures of powerful non-States Parties. Moreover, because those states that carry political influence on the geopolitical stage are the most capable of militarizing widespread public opinion, the ICC is often forced to cater to the most powerful nations, further exacerbating the political influence on the ICC.²⁴³

While greater State Party membership—especially among superpowers—is a powerful enforcement mechanism, and a less reliant relationship on the U.N. Security Council could significantly increase the ICC’s power and ability to defend itself against propaganda wars, these changes are highly unlikely. Not only is the Rome Statute’s amendment process quite extensive,²⁴⁴ but these new measures would require states—including those superpowers like the United States, China, and Russia—to surrender even greater sovereignty. In the current political climate, such change is idealistic at best. Another less palatable option is for the ICC to fully embrace its political nature, with the Prosecutor selecting to investigate only non-controversial matters that would not anger powerful states.²⁴⁵ This approach would allow the Prosecutor, and by extension, the ICC, to avoid contentious

241. Tom O’Connor, *ICC President Condemns ‘Unprecedented’ U.S. Attack on International Court*, NEWSWEEK (June 22, 2020, 5:32 AM), <https://www.newsweek.com/icc-president-unprecedented-us-attack-court-1512541>.

242. True-Frost, *supra* note 43, at 263.

243. ICC PROSECUTOR 2019-2021 STRATEGIC PLAN, *supra* note 165, ¶ 8(b).

244. Kevin Jon Heller, *The Rome Statute’s Flawed Amendment Regime—Starvation in NIAC Edition*, OPINIO JURIS (July 12, 2019), <http://opiniojuris.org/2019/12/07/the-rome-statutes-flawed-amendment-regime-starvation-in-niac-edition/>.

245. See Allen S. Weiner, *Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence*, 12 WASH. U. GLOB. STUD. L. REV. 545, 546 (2013) (making the “scandalous” argument that the ICC Prosecutor “needs to make careful and self-conscious political choices regarding charging strategies, particularly during the formative stages of the tribunal, in order to enhance the effectiveness and international standing of the institution”).

cases in hopes of pleasing the countries with the loudest voices while drowning out those who lack the same international platform. And although some strategic case selection by the Prosecutor is necessary, allowing selection to be guided primarily by political motivations runs contrary to the purpose of the Rome Statute. It would allow cases most deserving of prosecution to be met with impunity, simply because the perpetrators come from a nation that holds significant geopolitical power. Impunity is not what was envisioned during the creation of the ICC, nor what should be expected of its future. In the long run, allowing politics to guide the ICC's direction would do more damage to the ICC's legitimacy, and would contribute to an image of the ICC as too weak to take on politically controversial cases.

The key to minimizing the detrimental impact of propaganda wars against the ICC's operations appears to lie in promoting the ICC's perceived legitimacy, both within States Parties as well as non-States Parties. In democratic nations, appealing directly to nationals could work to impose pressures on state governments to foster deeper relationships with the ICC. Promoting the ICC's perceived legitimacy will correlatively improve the level of cooperation the ICC receives.²⁴⁶ Accordingly, it is imperative that the ICC improve its perceived legitimacy first and foremost among its States Parties. Doing so will promote cooperation in the event that a State Party comes under investigation by the ICC Prosecutor, yet, even more importantly, it will solicit support among States Parties to pressure non-compliant states to cooperate with the ICC. The failure of States Parties to respond to non-compliant states has contributed to many of the ICC's failings, and as both Prosecutor Bensouda and ICC President Eboe-Osuji recognize, States Parties must act in the face of non-compliance.²⁴⁷ The need for greater perceived legitimacy is also necessary among nationals of non-States Parties. Increased legitimacy throughout non-States Parties could both help in increasing ICC membership and in tempering non-State Party propaganda warfare.

Obtaining greater success in prosecutions that publicly appear to be fair and unbiased should be the primary focus in promoting the ICC's legitimacy. Understandably, empirical research suggests that "people are most likely to support the ICC when they believe international organizations are effec-

246. True-Frost, *supra* note 43, at 315.

247. Statement, Int'l Crim. Ct., Full Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn from the Kenya Situation, Annex 1, ICC OTP Kenya Cases: Review and Recommendations: Executive Summary of the Report of the External Independent Experts, at 5 (Nov. 26, 2019) (recognizing that one of the reasons for the Prosecutor's failure to effectively prosecute the Kenyan cases was that "States Parties [did not] seem to have the political will to pressure the [Kenyan Government] to act consistent with its obligations under the Statute and to refrain from allowing interference with and/or interfering with the OTP criminal justice activities"); O'Connor, *supra* note 241 (reflecting Judge Eboe-Osuji's statement that an attack against the ICC is not only an attack against the judicial mechanism itself, but on the 123 States Parties as well).

tive and unbiased.”²⁴⁸ Both the Prosecutor and the Independent Expert Review of the ICC solicited by the Assembly of States Parties²⁴⁹ have proposed numerous strategies to achieve more effective investigations and prosecutions, including obtaining a stronger evidentiary base at an early stage in every case;²⁵⁰ working more closely with national investigative and prosecutorial agencies and hiring more investigators, analysts and prosecutors from diverse backgrounds, so as to be more equipped to navigate culturally difficult investigations;²⁵¹ and implementing a more regular and effective review of standards and practices.²⁵² Significant changes in investigatory and prosecutorial strategy may also result with the upcoming transition in ICC prosecutorial leadership, with Karim Khan scheduled to replace Fatou Bensouda as ICC Prosecutor and begin his nine-year term in June 2021.²⁵³

To truly improve its perceived legitimacy, the ICC must also make a series of practical changes in its operations to complement these strategical modifications, including both modifications to how the Prosecutor addresses its relationships with nationals of States Parties and non-States Parties, as well as how it handles issues of non-compliance during investigations. The ICC must foster legitimacy through outreach and establish a presence on the ground in post-conflict States when possible. It must also effectively cultivate a better public image by developing stronger public relations and communications strategies. Finally, the ICC and the Assembly of States Parties must appropriately address issues of state non-compliance in order to deter future obstructionist campaigns.

A. *Fostering Legitimacy through Outreach & Presence*

The ICC’s susceptibility to propaganda and the spread of disinformation, as evidenced in both the Kenya and Afghanistan Situations, can largely be traced to a lack of knowledge about and unrealistic expectations

248. Kelebogile Zvobgo, *The Trump Administration opposes the International Criminal Court. Do Americans Agree?* WASH. POST (Apr. 28, 2019, 1:00 AM), <https://www.washingtonpost.com/politics/2019/04/28/trump-administration-opposes-international-criminal-court-do-americans-agree/>.

249. Int’l Crim. Ct. Assembly of States Parties Res. ICC-ASP/18/Res. 7, ¶ 6, Review of the International Criminal Court and the Rome Statute System (Dec. 6, 2019).

250. ICC PROSECUTOR 2019-2021 STRATEGIC PLAN, *supra* note 165, ¶ 14(a). By front-loading the investigations, especially before any charges or summons are announced, the Prosecutor faces less risk of State non-compliance that may arise after the announcement of charges, as was the case in the Kenya Situation.

251. *Id.* ¶ 16.

252. *Id.* ¶ 17; see Independent Expert Review of the international Criminal Court and the Rome Statute System Final Report, ICC-ASP/18/Res.7, at 117–18; 258–59 (Sept. 30, 2020) [hereinafter ICC Expert Review].

253. Press Release, Int’l Crim. Ct., Assembly of States Parties concludes the second resumption of its nineteenth session (Feb. 12, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1567>.

of the ICC by nationals of States Parties and non-States Parties alike.²⁵⁴ As the current ICC Office of the Prosecutor has lamented, “affected communities and members of the public often expect the Office [of the Prosecutor] to exercise jurisdiction in the most serious situations of conflict and criminality around the world, including situations where the ICC has no jurisdiction.”²⁵⁵ Unrealistic expectations of the ICC are unfortunately all too common given the lack of widespread global understanding of the ICC’s complexities, such as its jurisdictional reach or its principle of complementarity.

Kenya demonstrated just how serious of a concern a lack of national knowledge about the ICC can be. As Yvonne Dutton has explained,

Poor communication led victims to have unrealistic expectations about what the ICC could achieve in Kenya—resulting in victims becoming dissatisfied with the Court’s progress. It comes as no surprise that the public did not mobilize on behalf of the ICC when the public in “some parts of Kenya that bore the brunt of the violence” was “barely aware” of the Court.²⁵⁶

This lack of knowledge led to Kenyans being easily swayed by their political leaders’ misrepresentations about the ICC. The same problem—lack of knowledge and familiarity with the ICC—is evident in the United States. This problem is most aptly summarized by Richard Dicker of Human Rights Watch who has said:

Americans don’t really pay much attention to these sorts of foreign policy things, which is why the media don’t bother investigating or explaining... This is sad because I believe that if we were successful in getting information out to people, they would see that there is no contradiction between their deeply held values and what the International Criminal Court stands for.²⁵⁷

Dicker’s statement has epistemological support. A 2018 study conducted by Ipsos identified that seventy-three percent of the 1,004 adult Americans polled supported “international organizations that ‘support human rights and hold individuals accountable for mass atrocities.’”²⁵⁸ Yet, only forty-five percent of the Americans polled were aware of the existence of the ICC.²⁵⁹ Of those who admitted awareness, relatively few had a basic knowledge of the ICC, with sixty-two percent incorrectly believing that the

254. The Real Story, Podcast: *Has the International Criminal Court Failed?*, BBC: (Apr. 5, 2019), <https://www.bbc.co.uk/programmes/w3csydcn>.

255. ICC PROSECUTOR 2019-2021 STRATEGIC PLAN, *supra* note 165, ¶ 8(a).

256. Dutton, *supra* note 6, at 106.

257. PARIS, *supra* note 53, at 67.

258. *Study of Americans who Know about the ICC – Number of Americans Who Support the ICC Grows*, IPSOS (Apr. 11, 2018), https://www.ipsos.com/sites/default/files/ct/news/documents/2018-04/american_bar_association-factum-2018_04_11.pdf

259. *Id.*

United States is a State Party.²⁶⁰ Given this general lack of knowledge, studies have reflected that Americans are heavily reliant on publicly made arguments, including those from partisan political leaders, to form their opinions regarding the ICC,²⁶¹ making the Trump Administration's propaganda war that much more damaging. While anti-ICC rhetoric dominates the media, the voices of ICC supporters are less publicized. Outside of the occasional editorial opinion or tweet by a high-profile politician with a sizable following,²⁶² much of the opposition to Trump's propaganda war can be found on scholarly blogs or on other outlets primarily targeting audiences who are already knowledgeable about the ICC. As a result, much of what the American public at large has heard about the ICC is the Trump Administration's unsupported and biased claims and its retaliatory response to the ICC's lawful investigation.

Since knowledge and understanding of the ICC is fundamental to the ICC's legitimacy, and, by extension, states' willingness to cooperate with investigations, critical resources need to be devoted to ICC outreach. The ICC's External Expert Review identifies outreach efforts as opportunities for the ICC to "win the confidence, support, and cooperation of people and communities that have often been traumatised and scarred by the events the ICC is investigating."²⁶³ The ICC has fallen flat in outreach especially in recent years. In its nascent years, the ICC adopted a "low-profile approach" to outreach, conducting outreach missions on an ad hoc basis by staff permanently based in the Hague.²⁶⁴ This approach presented a perception that the ICC was disengaged from the people directly impacted by the cases which it investigated.²⁶⁵ While the ICC's outreach improved for several years, especially once a dedicated Outreach Unit was finally established in 2007,²⁶⁶ outreach no longer seems to be one of the ICC's primary objectives. Instead, recent outreach efforts have been informationally and culturally insufficient for recipients to understand and appreciate the ICC's role in a particular sit-

260. *Id.* Other researchers encountered a similar problem. In a 2019 study of 1,020 online participants, about half had no prior knowledge of the ICC, and even those with knowledge were not deeply familiar. Zvobgo, *supra* note 248.

261. Zvobgo, *supra* note 248.

262. See Bernie Sanders (@SenSanders), TWITTER (Sept. 2, 2020, 3:42 PM), <https://twitter.com/SenSanders/status/1301244152634585091> (in which Senator and 2020 Presidential Candidate Bernie Sanders tweeted "Sanctioning the [ICC] shows once again that Trump is on the side of authoritarians around the world. The United States should be working to strengthen international human rights standards, not targeting officials who uphold them.>").

263. ICC Expert Review, *supra* note 252, at 125–26.

264. Sara Darehshori, *Lessons for Outreach from the Ad Hoc Tribunals, The Special Court for Sierra Leone, and the International Criminal Court*, 14 NEW ENG. J. INT'L & COMP. L. 299, 303 (2008).

265. *Id.*

266. The ICC also improved on its outreach initiatives in the third situation to open before the Court, in which the ICC opened a field office in the Central African Republic within five months of commencing criminal investigations. *Id.* at 303, 306.

uation.²⁶⁷ While the ICC publicized and evaluated its outreach efforts in annual reports from 2007 to 2010, its most recent report is more than a decade old.²⁶⁸ Moreover, outreach initiatives were not addressed in the 2019-2021 Strategic Plans issued by the Office of the Prosecutor²⁶⁹ or the ICC's Registry, the organ of the ICC responsible for conducting outreach,²⁷⁰ and demands for the ICC to rejuvenate its outreach program have gone largely unaddressed.²⁷¹

To cure its current perceived legitimacy crisis, caused by repeated propaganda wars, the ICC must revitalize its outreach program. Specifically, the ICC needs to approach the concept of outreach with the goal of educating the global populace at large about the ICC and its operations.²⁷² Outreach should largely be based around the idea “that when stakeholders understand the issues and are engaged in a justice institution’s work, support will likely follow.”²⁷³ Accordingly, opportunities should also be given for the populace to question the ICC and express their expectations and criticisms.²⁷⁴ Permitting civilian feedback and incorporating this feedback into future strategic plans will help bring local involvement into the ICC and will mold a court more responsive to the public’s expectations, thereby directly improving the ICC’s perceived legitimacy.

For States Parties under prosecutorial investigation, it is especially important that the ICC use outreach to connect with the local communities and foster support of the ICC’s initiatives in that state. Doing so will inspire greater governmental cooperation and will more easily combat potential propaganda utilized by the defendants subject to ICC investigation. Outreach should be instituted early in the case process, throughout the preliminary examination stage.²⁷⁵ In considering how best to connect with the pub-

267. ICC Expert Review, *supra* note 252, at 126 (also recognizing that outreach efforts have encountered “significant delays”).

268. *Interacting with Communities Affected by Crimes*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/interacting-with-communities> (last visited Sept. 10, 2020) (providing Outreach Reports only for 2007-2010).

269. ICC PROSECUTOR 2019-2021 STRATEGIC PLAN, *supra* note 165.

270. Registry Strategic Plan (2019-2021), ¶ 3 (July 17, 2019), <https://www.icc-cpi.int/itemsDocuments/190717-reg-strategic-plan-eng.pdf>.

271. *See generally, e.g.*, Dutton, *supra* note 6 (recommending that the ICC engage in greater in-person outreach); NO PEACE WITHOUT JUSTICE, THE INTERNATIONAL CRIMINAL COURT’S FIELD PRESENCE (2009), <http://www.npwj.org/sites/default/files/documents/File/Field%20Operations%20Paper%20November%202009.pdf> (calling for the States Parties and organs of the ICC to consider using ICC field offices to improve state-Court relations).

272. Alison Smith, *Outreach and the Kosovo Specialist Chambers: A Civil Society Practitioner’s Perspective*, 20 INT’L CRIM. L. REV. 125, 130 (2020).

273. *Id.*

274. *See id.* (noting that effective court outreach will be “bi-directional”).

275. *Id.* at 132–33; *see also* Darehshori, *supra* note 264, at 303–04 (noting that had it not failed to institute early outreach in Uganda, the ICC could have mitigated a negative perception widely held by the Ugandan public).

lic in States Parties, the ICC should consider the outreach successes achieved by several hybrid tribunals,²⁷⁶ such as the Special Court for Sierra Leone,²⁷⁷ and the Extraordinary Chambers in the Courts of Cambodia,²⁷⁸ both of which were located in-state. The Sierra Leonean Court, for instance, developed a beneficial relationship with the local media that facilitated accessibility of its proceedings to the general population in Sierra Leone.²⁷⁹ The Cambodian Tribunal likewise engaged in significant and effective outreach throughout Cambodia by facilitating the visits of hundreds of thousands of Cambodians to the tribunal to attend court proceedings.²⁸⁰

Arguably, the best way to promote a better view of the ICC among the communities it is designed to serve is to develop an on-the-ground presence, as was effectively done in Sierra Leone and Cambodia. As a permanent international court, the ICC is primarily seated in the Hague, far removed from nearly all of the situations it investigates.²⁸¹ This lack of presence is incredibly damaging to the ICC in terms of legitimacy because it creates a perception of far-removed justice. Legitimacy and location are inextricably intertwined; in the minds of victims and members of post-conflict societies, “geographic distance equates to institutional indifference.”²⁸² Communities cannot enjoy a sense of local ownership over or connection to the justice process when this is occurring worlds away from where they are located, especially when the trials are not widely publicized in the post-conflict state.²⁸³ The ICC, however, has a means of fostering this local ownership.

276. Hybrid tribunals blend characteristics of domestic and international courts by typically sitting in the state where the crimes at issue were committed; staffing international and domestic judges, lawyers, and staff; and applying a mix of international and domestic law and procedures. Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT’L L. & POL’Y 169, 172–73 (2016).

277. Dutton, *supra* note 6, at 92 (recognizing the Special Court for Sierra Leone as the “gold standard of tribunal outreach initiatives”).

278. JOHN D. CIORCIARI & ANNE HEINDEL, *HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 271 (2014) (noting that as of 2014, the Cambodian Tribunal had surpassed all other international courts in terms of outreach).

279. See Patrick Vinck & Phuong N. Pham, *Outreach Evaluation: The International Criminal Court in the Central African Republic*, 4 INT’L J. TRANS. JUST. 421, 423 (2010).

280. CIORCIARI & HEINDEL, *supra* note 278, at 240–41.

281. Rome Statute, *supra* note 5, art. 3(1); Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08 (Mar. 1, 2008), <https://www.icc-cpi.int/NR/rdonlyres/99A82721-ED93-4088-B84D-7B8ADA4DD062/280775/ICCBD040108ENG1.pdf>.

282. Frank Dame, *The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal*, 24 MICH. ST. INT’L L. REV. 211, 246 (2015).

283. *Id.*; see also David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT’L L. 1, 6 (2007) (noting that victims can easily dismiss the processes of far removed international courts as being “imposed by foreign countries and organizations who have misunderstood what really happened”); William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT’L L.J. 729, 736 (2003) (recognizing that

Under Rome Statute article 3, the ICC, in its discretion, may sit in a location outside of the Hague, “whenever it considers it desirable.”²⁸⁴ Yet, despite repeated calls for the ICC to sit locally,²⁸⁵ some of which it has openly considered,²⁸⁶ to date, the ICC has yet to conduct any trials outside of the Hague.

Temporarily re-locating the ICC locally would bring “a psychological proximity and sense of connection with the local community,” that would directly enhance the ICC’s perceived legitimacy.²⁸⁷ Rather than being perceived as a foreign court imposing justice without any direct stake in the community, the ICC could better portray itself as an institution designed to provide transitional and restorative justice to post-conflict communities. This change in venue would also provide for greater in-person outreach measures and improve the public’s knowledge of the ICC’s workings. Moreover, conducting ICC proceedings locally would foster significant transitional justice benefits that are currently lacking in the ICC. As a local court, the ICC could engage directly in capacity building measures to train local judges and prosecutors.²⁸⁸ These benefits are evident in the work of various hybrid tribunals located in post-conflict states.²⁸⁹ Many of these tribunals, including the Extraordinary Chambers in the Courts of Cambodia, the hybrid tribunal created to prosecute atrocities committed in Cambodia during the 1970s Khmer Rouge regime have engaged in outreach efforts that have far surpassed the ICC and the ad hoc international criminal tribunals.²⁹⁰ In fact, given in its location in Cambodia, the Cambodian tribunal has succeeded in facilitating the visits of significant number of Khmer Rouge victims or victims’ relatives to the tribunal to attend court hearings.²⁹¹ By sitting locally and adopting the hybrid tribunals’ approach to outreach,

“when a tribunal is perceived as a foreign agent, imposing its will on a national system, it quickly loses credibility”).

284. Rome Statute, *supra* note 55, art. 3(3).

285. Angeliq Lu, *Bangladesh’s Rohingya Refugees Lobby ICC to Sit in Asia During War Crimes Investigation*, ABC NEWS (Aug. 31, 2020), <https://www.abc.net.au/news/2020-09-01/bangladesh-rohingya-international-criminal-court-asia-refugees/12571818> (reporting recent calls by lawyers representing Rohingya victims for the ICC to sit in Asia to resolve cases within the Situation in Bangladesh and Myanmar).

286. Stuart Ford, *The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit all of the ICC’s Trials to Take Place at Local or Regional Chambers?* 43 J. MARSHALL L. REV. 715, 716 (2010) (recognizing that the ICC agreed to consider Tanzania’s offer to host ICC trials at the International Criminal Tribunal for Rwanda’s facilities in Arusha, Tanzania, yet never took action on this proposal).

287. Burke-White, *supra* note 283, at 736.

288. *Id.* at 735–36.

289. Sara L. Ochs, *A Renewed Call for Hybrid Tribunals*, 52 N.Y.U. J. INT’L L. & POL., 351, 397–99 (2020) (discussing the restorative and transitional justice provided by in-state hybrid tribunals in the form of local ownership).

290. *Id.* at 387 (citing CIORCIARI & HEINDEL, *supra* note 278, at 271).

291. *Id.*

the ICC can bring practical change to the domestic legal systems of the post-conflict states where it conducts investigations and can thus generate a legacy of legitimacy within the state and greater region that will remain beyond its stay.

Of course, sitting locally would not be practical for all or even most cases, and would only be possible in states with a certain level of stability and where the state's government supports the ICC's investigation.²⁹² Thus, in circumstances where a state seeks to use a propaganda war against the ICC—like in Kenya or the United States—security concerns and potential political interference in ICC operations would outweigh any transitional justice or outreach benefit. Yet, by sitting locally when possible, the ICC can cultivate greater legitimacy and knowledge and directly improve the public's perception of its legitimacy.

Attention must also be given to outreach in States Parties not subject to investigation, as well as in non-States Parties. As the ICC's Independent Expert Report notes, the ICC needs to further promote outreach by enhancing coordination with civil society organizations.²⁹³ For instance, initiatives like the Coalition for the ICC and the American Bar Association's ICC Project in the United States have made great strides in explaining and highlighting the ICC to the general population.²⁹⁴ However, their collective reach remains constrained by ineffective communication with the Office of the Prosecutor.²⁹⁵ By investing greater time and resources directly into direct outreach measures and greater collaboration with civil society organizations in both States Parties and non-States Parties, the ICC can foster knowledge of, involvement in, and connection to the ICC that is currently lacking, and in doing so, inspire greater state cooperation in future investigations.

B. *Enhancing Public Image*

In addition to fostering knowledge of the ICC through expanded outreach and presence, one of the most straightforward and practical measures the ICC can adopt to promote its legitimacy is a better approach to public relations. As a result of the ICC's lack of an integrated or comprehensive communications strategy,²⁹⁶ it is currently suffering from a number of public relations challenges and has recently been plagued by a dysfunctional, elitist image. Notably, experts have noted a “breakdown in collegiality” between

292. Ford, *supra* note 286, at 718.

293. ICC Expert Review, *supra* note 252, at 123.

294. See generally *What We Do*, COAL. FOR INT'L CRIM. CT., <https://www.coalitionfortheicc.org/about/what-we-do> (last visited Jan. 5, 2021) (outlining the work of the Coalition for the ICC); *American Bar Association's International Criminal Court Project*, ABA-ICC PROJECT, <https://www.aba-icc.org/> (last visited Jan. 5, 2021) (explaining that this project aims to support the ICC and US-ICC relations “through advocacy, education, and practical legal assistance”).

295. ICC Expert Review, *supra* note 252, at 122.

296. *Id.* at 124.

the Office of the Prosecutor and the ICC judges as well as among the judges themselves.²⁹⁷ Even worse, a publicized internal battle between ICC administration and judges demanding higher salaries is contributing to a widely held perception of the ICC as “an elite institution whose members are out of tune with reality.”²⁹⁸ Moreover, while the ICC’s failings and negative attributes are often widely reported, their achievements are much less so. As Stuart Ford concluded after synthesizing a number of recent empirical studies, the ICC has succeeded in preventing violence and successfully reducing the global number of serious human rights abuses.²⁹⁹ Yet, conclusions such as Professor Ford’s are often drowned out by the criticisms of the ICC’s more tangible failures, such as the dismissal of charges against Ruto and Kenyatta.

Recent events further indicate the ICC’s need for greater publicity of its achievements. For instance, in early September, several esteemed news outlets, including the *New York Times*,³⁰⁰ reported that two soldiers of the Myanmar Army had confessed on video to committing crimes against Rohingya Muslims pursuant to genocidal orders.³⁰¹ The *New York Times* further reported that the men had been transferred to ICC custody on September 7, 2020, for further detention and questioning.³⁰² Given that the Prosecutor has opened a *proprio motu* investigation into crimes against the Rohingya committed in Myanmar,³⁰³ acquiring custody over two soldiers willing to testify as to genocidal intent would be considered a great victory for the ICC Prosecutor. Yet, without explanation, the ICC and the Prosecutor have remained silent, refusing to confirm or deny custody of the two men. Not only does this fail to publicize a worthy prosecutorial accomplishment in a high-profile case, but in the event that the men are not actually in custody—

297. Sterio, *supra* note 170, at 471; Douglas Guilfoyle, *Part II-This is not fine: The International Criminal Court in Trouble*, EJIL: TALK! (Mar. 22, 2019), <https://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/>.

298. Sterio, *supra* note 170, at 473.

299. Stuart Ford, *Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention*, 43 LOY. L.A. INT’L & COMP. L. REV. 101, 119–20 (2020).

300. *Two Myanmar Soldiers Taken to the Hague After Confessing to Rohingya Killings: Reports*, REUTERS (Sept. 8, 2020), <https://www.reuters.com/article/us-myanmar-rohingya/two-myanmar-soldiers-taken-to-the-hague-after-confessing-to-rohingya-killings-reports-idUSKBN25Z1KD> (noting that the news had been reported by the *New York Times*, the Canadian Broadcasting Corporation, and the human rights group Fortify Rights).

301. Hannah Beech, *‘Kill all You See’: In a First, Myanmar Soldiers Tell of Rohingya Slaughter*, N.Y. TIMES (Sept. 8, 2020) (explaining that in video testimony, the men confessed that they obeyed orders from their commanding officers to “kill all you see, whether children or adults”); Nahlah Ayed, *Once Foot Soldiers in Myanmar’s Army, Now Potential Witnesses to Mass Atrocities*, CBC NEWS (Sept. 8, 2020), <https://www.cbc.ca/news/world/myanmar-soldiers-custody-hague-1.5715272>.

302. Beech, *supra* note 301.

303. *Bangladesh/Myanmar*, INT’L CRIM. CT., <https://www.icc-cpi.int/bangladesh-myanmar> (last visited Sept. 14, 2020).

which has been lightly debated³⁰⁴—then the ICC’s failure to formally dispute the reporting contributes to a lack of transparency that clouds general knowledge of the ICC’s work. Either way, a strong public relations approach and straightforward, court-wide communications strategy would have handled this situation much differently.

And while public relations do not fall directly within the ICC’s mandate, it is a necessary evil that the ICC must consider in seeking to boost its perceived legitimacy. This is especially necessary considering that some of the exact individuals whom the Prosecutor is targeting use public relations firms to boost their own global image and to further their propaganda wars against the ICC.³⁰⁵ As an example, Kenyatta hired the British public relations firm BTP Advisers to assist in his 2013 election campaign, which “used their local and international networks to present the ICC as a machination of Western powers.”³⁰⁶ While Kenyatta and Ruto are assumed to be responsible for painting the ICC as a neo-colonialist institution, ironically, the blame for this is likely better attributed to white British spin-doctors. By not taking full advantage of public relations and effective communications opportunities, the ICC is placing itself at an even greater disadvantage to powerful nations. Idealistically a court should never have to rely on publicity; however, for a court like the ICC, which is fully dependent on support and legitimacy, failing to utilize public relations will further hamper its ability to conduct effective investigations and prosecutions.

C. Stronger Consequences for Noncompliance

Propaganda warfare is so devastating because it is often supplemented—as done by Kenya and threatened by the United States—by a refusal to cooperate with ICC investigations or prosecutions. As discussed at length, the ICC can only function effectively when its States Parties cooperate with the ICC.³⁰⁷ And while increased outreach and better public relations can inspire greater cooperation, the Rome Statute’s current compliance scheme provides no definitive punitive recourse against non-compliant States.³⁰⁸ Ar-

304. *Two Myanmar Soldiers Taken to the Hague*, *supra* note 300 (reporting that an ICC spokesperson denied that the ICC had the men in custody).

305. *See generally* CORP. EUR. OBSERVATORY, SPIN DOCTORS TO THE AUTOCRATS: HOW EUROPEAN PR FIRMS WHITEWASH REPRESSIVE REGIMES (2015) available at https://corporateurope.org/sites/default/files/20150120_spindoctors_mr.pdf (explaining that many autocratic regimes, including those currently subject to investigation by the ICC Prosecutor, such as Cote d’Ivoire, Democratic Republic of the Congo, and Israel, use European public relations firms to improve their global image).

306. *Id.* at 34.

307. Ali, *supra* note 38, at 415 (arguing that without enforcement mechanisms to ensure compliance, “the ICC will be extremely ineffective in its mandate to administer justice”).

308. Joseph M. Isanga, *The International Criminal Court Ten Years Later: Appraisal and Prospects*, 21 CARDOZO J. INT’L & COMP. L. 235, 246–47 (2013) (noting that after ten years, Article 87 “has not been able to force state parties to comply with their duty to cooperate”).

article 87 provides for the referral of non-compliant States Parties to the Assembly of States Parties or—in the event that the non-compliance relates to a Security Council-referred Situation—to the Security Council, but it fails to delineate what actions either the Assembly of States Parties or the Security Council may take upon referral.³⁰⁹

Kenya's largely unpunished non-compliance drew glaring light on the Rome Statute's enforcement deficiencies. Despite the Trial Chamber's initial refusal to formally find Kenya non-compliant, in response to the Prosecution's appeal,³¹⁰ the Trial Chamber issued a decision in 2016—following the termination of charges against both Kenyatta and Ruto—declaring the Kenyan Government non-compliant under article 87 and referring it to the Assembly of States Parties.³¹¹ However, Kenya does not appear to have faced any real consequence from the Assembly of States Parties following its referral. Instead, the 2016 Assembly of States Parties Report of the Bureau on non-Cooperation simply made a note of the Trial Chamber's finding of non-compliance but failed to acknowledge any punitive action taken against Kenya in response to the finding.³¹² As a result, not only did the Kenyan defendants escape liability for alleged crimes against humanity, but they further avoided any consequence for their stark violations of the Rome Statute.³¹³

To guarantee more committed cooperation by States Parties, the ICC needs to encourage modifications to its compliance scheme. However, rather than amending the Rome Statute, it should call upon the Assembly of States Parties, which is composed of representatives of States Parties to the Rome Statute and acts as the ICC's "management oversight and legislative

309. Rome Statute, *supra* note 55, at art. 87(7); Annie Wartanian, *The ICC Prosecutor's Battlefield: Combating Atrocities While Fighting for States' Cooperation Lessons from the U.N. Tribunals Applied to the Case of Uganda*, 36 GEO. J. INT'L L. 1289, 1298 (2005); Barnes, *supra* note 66, at 1616.

310. Prosecution appeal against the "Decision on Prosecution's application for a finding of noncompliance under Article 87(7) of the Statute," ICC-01/09-02/11 (Mar. 20, 2015), https://www.icc-cpi.int/CourtRecords/CR2014_09899.PDF.

311. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, at 17-18, ICC-01/09-02/11 (Sept. 19, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_06654.PDF.

312. See generally Assembly of States Parties Report of the Bureau on non-cooperation, ICC-ASP/15/131 (Nov. 8, 2016), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-31-ENG.pdf (acknowledging the Trial Chamber's finding of Kenya's noncompliance but taking no punitive action in response).

313. While certain media outlets have reported that the Prosecutor has initiated a witness tampering investigation into the Kenyatta and Ruto cases, to date, no formal proceedings have resulted from this alleged investigation. Kamore Maina, *Kenya-ICC starts investigation into witness tampering in Kenyatta, Ruto and Sang cases*, AFR. SUSTAINABLE CONSERVATION NEWS (Jan. 30, 2017), <https://africasustainableconservation.com/2017/01/30/kenya-icc-starts-investigation-into-witness-tampering-in-kenyatta-ruto-and-sang-cases/>.

body,”³¹⁴ to utilize stronger tools to rectify non-compliance. Article 87 already impliedly provides for the Assembly of States Parties to handle referrals of non-compliance in the means it deems fit,³¹⁵ and article 112 reinforces this by granting the Assembly the right to consider “any question relating to non-cooperation.”³¹⁶ Despite these broad delegations of power, and as evidenced with the referral of Kenya, the Assembly of States Parties has taken a very minimal response to dealing with referred non-compliant States Parties in the past. While the Assembly has issued several annual resolutions pertaining to the issue of state cooperation with the ICC, these appear to do no more than simply restate the Rome Statute’s mandatory cooperation scheme and call upon states to voluntarily consider strengthening their cooperative relationships with the ICC.³¹⁷ This approach is insufficient. As evidenced through past propaganda wars, States Parties will not voluntarily cooperate with the ICC unless doing so would promote their national self-interests.³¹⁸ Instead, States Parties will only be prompted to cooperate under threat of punitive consequences.³¹⁹

Accordingly, the Assembly of States Parties should consider enacting a Resolution encouraging States Parties to impose bilateral economic or diplomatic sanctions on States Parties whom the Trial Chamber has deemed non-compliant. Monetary penalties have previously proven effective in enforcing compliance with ICC orders. As Annie Wartanian has noted, the United States was able to ensure Serbian compliance with orders issued by the International Criminal Tribunal for the Former Yugoslavia by conditioning foreign aid to the Former Yugoslavia on this compliance.³²⁰ By inspiring States Parties to impose economic or diplomatic sanctions, States Parties subject to ICC investigation would be much more willing to comply, upon being pressured to choose between financial consequences or liability.

314. *Assembly of States Parties*, INT’L CRIM. CT., <https://www.icc-cpi.int/asp> (last visited Sept. 18, 2020).

315. Rome Statute, *supra* note 5, art. 87(7).

316. Rome Statute, *supra* note 5, art. 112(2)(f).

317. *See e.g.*, Resolution ICC-ASP/18/Res.3 Resolution on cooperation, ¶ 19 (Dec. 6, 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res3-ENG.pdf (calling on States Parties to increase cooperation by entering into agreements with the ICC or taking protective measures to protect victims and witnesses); Resolution ICC-ASP/17/Res. 3, Resolution on cooperation (Dec. 11, 2018), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-3-ENG.pdf; Resolution ICC-ASP/15/Res.3, Resolution on cooperation (Nov. 24, 2016), https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP15/ICC-ASP-15-Res3-ENG.pdf.

318. W. Julian Korab-Karpowicz, *Political Realism in International Relations*, STAN. ENCYCLOPEDIA PHIL. (May 24, 2017), <https://plato.stanford.edu/entries/realism-intl-relations/> (explaining that the realist perspective of international relations recognizes that “states act in pursuit of their own national interests”).

319. *See* BA, *supra* note 12, at 25 (noting that under an international relations realist perspective, “law is meaningful in practice only when backed by enforcement and coercion”).

320. Wartanian, *supra* note 309, at 1306–07.

Moreover, encouraging States Parties' use of sanctions through a non-binding Assembly resolution would put the onus on the States Parties, rather than the ICC, to enforce compliance. Unlike the ICC, States Parties have enforcement mechanisms—through their military or police forces—to mandate compliance with these sanctions. Further, non-compliant states would be much less willing to endanger political relationships with other states—especially those that carry power on the geopolitical stage—than they would be to harm their relationship with the ICC, which has no formal recourse. Finally, such an approach would allow the ICC to frame one of its biggest weaknesses—the pervasive role of politics in Court operations—in its favor.

Again, however, such a solution is not without limitations. In order for States Parties to impose bilateral sanctions on non-compliant states, the ICC first and foremost needs to inspire these States Parties to do so by improving the ICC's perceived legitimacy. Economic sanctions will also be most effectively utilized by those most powerful states, which have resisted the reach of the ICC, such as the United States, Russia, and China.³²¹ The ability of less powerful nations to use bilateral sanctions to pressure non-compliant states may not carry the same level of consequence. Moreover, this bilateral sanction scheme would do little to enforce compliance from powerful and wealthy non-States Parties, like the United States. The Rome Statute only imposes a duty to cooperate on States Parties, leaving several of the permanent members of the Security Council free to refuse to cooperate with the ICC without consequence.³²²

However, despite these limitations, utilizing a State Party-sponsored enforcement mechanism for non-compliance will significantly improve the perceived legitimacy of the ICC throughout the globe. It will send a powerful message that States Parties believe so strongly in the ICC that they are willing to take geopolitical measures to support its operations. Not only will these sanctions promote the ICC's effectiveness and ensure greater compliance from investigated states, but they will further portray the ICC as a strong and legitimate mechanism and mitigate reputational damage caused by past incidents of non-compliance.

VI. CONCLUSION

The ICC will always elicit criticism, both from its States Parties and those states who will eternally oppose the ICC. As an undeniably quasi-political entity, the ICC can never hope to appease all states; history has proven that it will be criticized when it chooses to pursue investigations as

321. *Id.* at 1307 (noting that the United States' decision to condition financial aid on state compliance with the ICTY was so effective because of the United States' power and financial wealth, and questioning whether other, less powerful states, could provide as effective bilateral pressure).

322. Rome Statute, *supra* note 5, art. 87(7); Wartanian *supra* note 309, at 1297–98.

well as when it declines to.³²³ As an entity designed to prosecute high ranking officials responsible for the worst crimes facing humanity, the ICC is bound to make powerful enemies who carry loud voices on the geopolitical stage. These enemies, like the leaders of Kenya and the Trump administration in the United States, have taken advantage of the ICC's weaknesses by effectively using anti-ICC propaganda and disinformation in complement with a refusal to cooperate with investigations. This type of approach has successfully worked to discredit the ICC and its Prosecutor and has rendered investigations impossible.

To effectively counteract the damage that propaganda wars have caused to the ICC, there needs to be critical change. Yet, while fundamental modifications to the Prosecutor's selection, investigation, and prosecutorial strategy are imperative, these changes alone will not solve the ICC's problems. Instead, the ICC must begin to think strategically and operate in a more practical manner by promoting its work to the public at large, both within and outside of States Parties, and adapting a stronger approach to enforcing state compliance. These changes are critical as the ICC begins to investigate politically charged and highly controversial situations, including those involving alleged crimes committed by the United States and Israeli nationals. With problematic cases on the horizon, states' leaders will not stop seeking to destroy the legitimacy of the ICC. Instead, the ICC must adapt to better defend itself.

323. See *Chile Eboe-Osuji: Can the International Criminal Court achieve its goals?* BBC SOUNDS (June 22, 2020), <https://www.bbc.co.uk/sounds/play/w3cszc1y> (in which Stephen Sackur first criticized Judge Eboe-Osuji and the ICC for having the gall to take on the United States, and shortly thereafter, adamantly demanded an explanation for why the ICC had not pursued an investigation in Syria, a nation that is also not a State Party and one that has made clear that it will not support any ICC actions related to its ongoing civil war).