

ARTICLES

THE WAR IN UKRAINE AND THE LEGITIMACY OF THE INTERNATIONAL CRIMINAL COURT

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The news of the many atrocities being committed as the war in Ukraine rages on has prompted a chorus of calls seeking to hold perpetrators accountable. Heralded as a critical player is the International Criminal Court (the ICC or “Court”). Unlike in the past where states have decried requests to increase the Court’s budget or refused to cooperate with the Office of the Prosecutor’s (“OTP”) efforts to gather evidence or arrest suspects, states are generously donating funding and other resources to bolster the Court’s likelihood of bringing successful prosecutions.

This Article argues that the unique situation surrounding state support for the ICC’s critical role in prosecuting crimes resulting from the Russian invasion may enhance the legitimacy of the Court. International institutions like the ICC can be legitimate both objectively and subjectively. Objective legitimacy is present if the institution’s processes conform to normative positive performance criteria; for example, it provides due process to defendants standing trial. Subjective legitimacy is present when the relevant audience believes that the institution is properly carrying out its functions and fulfilling its mandate. This Article focuses on subjective, or perceived, legitimacy—specifically as it relates to how states perceive the Court. It does so because it is states to whom the Court must

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turn to receive funding and other assistance. If that audience does not perceive the Court as legitimate, it will be less likely to continue to support it.

This Article suggests that if the ICC can carry out a successful investigation in Ukraine, leading to possible prosecutions, the outcome for the ICC is that states and all interested stakeholders may begin to perceive the Court as an institution corresponding to its founding mandate to end impunity for the most serious international crimes. If states do not continue to support the Court, however, these important outcomes for victims and for the Court may be lost.

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“[I]nvestment in justice, such as is administered in this Court, is an investment in the peaceful and stable future we want for our shared humanity.”
—Judge Chile Eboe-Osuji¹

INTRODUCTION

The news of the international atrocities as the war in Ukraine rages on has prompted a chorus of calls seeking to hold perpetrators accountable. Heralded as a critical player is the International Criminal Court (the ICC or “Court”), established in 2002 after the required sixty states ratified the treaty creating the Court—the Rome Statute.² Unlike in the past, where states have decried requests to increase the Court’s budget or refused to cooperate with the ICC Office of the Prosecutor’s (“OTP”) efforts to gather evidence or arrest suspects, states are generously donating funding and other resources to bolster the Court’s likelihood of bringing successful prosecutions.³

This Article argues that the unique situation surrounding state support for the ICC following the Russian invasion of Ukraine provides a legitimacy opportunity for the Court. International institutions can be both objectively and subjectively legitimate.⁴ Objective legitimacy refers to the institution’s ability to conform to normative positive performance criteria.⁵ Subjective legitimacy “refers to the perception of relevant audiences that an institution or decision is justified and deserves support independent of any sanction or reward associated

1. Judge Chile Eboe-Osuji, President, International Criminal Court, Remarks at the Opening of the 17th Session of the Assembly of States Parties to the Rome Statute 10 (Dec. 5, 2018), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20181205-pres-statement.pdf> [<https://perma.cc/4GSG-8RTZ>].

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

3. See *infra* Section II.B.

4. See Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFFS. 405, 405 (2006) (referencing the “normative and sociological meaning” of legitimacy).

5. See, e.g., Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES L. 411, 414–15 (2013) (distinguishing objective and subjective conceptions of legitimacy); Barbara Oomen, *Where Law and Politics Meet’: Looking at Human Rights Law through the Lens of Legitimacy*, 33 NETH. Q. HUM. RTS. 512, 516–17 (2015) (exploring some definitions of normative, or objective, and subjective legitimacy); Alexandre Skander Galand, *A Global Public Goods Perspective on the Legitimacy of the International Criminal Court*, 41 LOY. L.A. INT’L & COMPAR. L. REV. 125, 145–46 (2018) (noting how social, or subjective, legitimacy interacts with an institution’s normative, or objective, legitimacy).

with such support.”⁶ This Article focuses only on subjective, or perceived, legitimacy—specifically in regards to how states view the ICC.⁷ States are the primary funders of the Court.⁸ If they do not perceive the Court as legitimate, they will be less likely to continue to support it, which in turn means that the ICC will have little chance of delivering on its mandate of ending impunity for the most serious international crimes.⁹

As Mark Kersten suggests, those who fund the Court are heavily influenced by the results it achieves—in terms of holding high-level perpetrators accountable.¹⁰ The Court’s track record on delivering convictions, though, is an area where states have directed much criticism.¹¹ Illustrative is the statement of a UK spokesman at the 2018 Assembly of States Parties meeting:

[W]e cannot bury our heads in the sand and pretend everything is fine when it isn’t. The statistics are sobering. After [nearly] 20 years, and 1.5 billion Euros spent we have only three core crime convictions. As others have said, and I quote “it is undeniable that

6. Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORDHAM INT’L L.J.* 1400, 1441 (2009); *see also* Oomen, *supra* note 5, at 517 (noting that subjective legitimacy depends on one’s perceptions of an institution).

7. Margaret deGuzman distinguishes between three different audiences whose perceptions of the Court’s legitimacy are relevant in terms of the Court’s ability to properly function: (1) global society; (2) states; and (3) affected domestic populations where the Court is pursuing investigations. DeGuzman, *supra* note 6, at 1444; *see also* Yvonne M. Dutton, *Bridging the Legitimacy Divide: The International Criminal Court’s Domestic Perception Challenge*, 56 *COLUM. J. TRANSNAT’L L.* 71, 77 (2017) (discussing domestic populations as a relevant audience in terms of the ICC’s perceived legitimacy).

8. The 123 States Parties to the Court contribute to the budget through assessed contributions. *See* Rome Statute, *supra* note 2, art. 115.

9. *See id.*, Preamble.

10. Mark Kersten, *Acquittals and the Battleground Over the ICC’s Legitimacy*, *JUST. CONFLICT* (Mar. 14, 2019), <https://justiceinconflict.org/2019/03/14/acquittals-and-the-battleground-over-the-iccs-legitimacy> [<https://perma.cc/C9AL-TGWN>].

11. *See, e.g.*, Christopher R.F. Hale, *The Way Forward for the International Criminal Court and Its Stakeholders: Focus Inward*, in *THE PAST, PRESENT AND FUTURE OF THE INTERNATIONAL CRIMINAL COURT* 159, 203 (Alexander Heinze & Viviane E. Dittrich eds., 2021), <https://www.toaep.org/nas-pdf/5-dittrich-heinze> [<https://perma.cc/QCD6-WMFL>] (noting that the Assembly of States Parties, as a group, is disappointed in the Court’s performance and is reluctant to increase funding until the Court is more effective with its current resources); Jeremy Julian Sarkin, *Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process*, 21 *INT’L & COMPAR. L. REV.* 7, 8–9 (2021) (noting that the ICC has been operating for nearly twenty years and apprehended and convicted very few accused).

the Rome project still falls short of the expectations of the participants at that ground-breaking conference in Rome”.¹²

The OTP’s conviction numbers cannot be disputed, and like all institutions, the Court can improve its effectiveness and efficiency.¹³ Also possible, though, is that states’ inactions have contributed to the Court’s sparse conviction record—and in turn, contributed to states’ unfavorable perceptions of the Court. This Article explores whether the ICC’s conviction rate, and its perceived legitimacy, might improve if the Court received more assistance from states.¹⁴

Part I of the Article begins with a discussion of the Court’s jurisdictional regime and structural limitations to provide some context for examining some challenges the OTP faces in successfully convicting high-level government suspects. Part II then compares state support for the ICC before and after the Russian invasion before exploring the possibility that the unique circumstances surrounding states’ responses to the Russian invasion of Ukraine may enhance the Court’s perceived legitimacy.

Part III considers the Court’s potential legitimacy opportunity. It suggests that a primary reason the ICC may have failed to deliver previously—and why states may view it as lacking in legitimacy—is because states did not provide it with the resources and cooperation

12. See Douglas Guilfoyle, *This is Not Fine: The International Criminal Court in Trouble*, EJIL:TALK! (Mar. 21, 2019), <https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble> [<https://perma.cc/BN3E-F5R5>] (quoting the UK spokesperson).

13. Indeed, in 2020, the Assembly of States Parties commissioned a group of independent experts to review the internal workings of the ICC’s judiciary, registry, and the OTP to make recommendations on how the institution could improve. See ICC, *Independent Expert Review of the International Criminal Court and the Rome Statute System*, at 40 & n.99, ICC-ASP/19/16 (Sept. 30, 2020) [hereinafter *Independent Expert Review*]; see also Douglas Guilfoyle, *The International Criminal Court Independent Expert Review: Questions of Accountability and Culture*, EJIL:TALK! (Oct. 7, 2020), <https://www.ejiltalk.org/the-international-criminal-court-independent-expert-review-questions-of-accountability-and-culture> [<https://perma.cc/HX8U-4XAP>] (describing and linking to the Independent Expert Report).

14. See *infra* notes 96–103 and accompanying text. We recognize that the Court’s lack of convictions is not the only factor that may influence states’ perceptions about the Court’s legitimacy. For example, some African leaders have argued that the Court is an imperialistic Western institution that is biased against Africa. Rebecca J. Hamilton, *Africa, the Court, and the Council*, in *THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT* 261, 261 (Margaret M. deGuzman & Valerie Oosterveld eds., 2020). We address the anti-Africa argument below, but we focus primarily on the Court’s conviction rates because it is the issue that seems most relevant to the states responsible for providing the bulk of the Court’s funding.

required for it to investigate and prosecute complex mass atrocity cases. Part III discusses the need for broad state support for the ICC beyond the Ukraine investigation and also addresses the need for state cooperation. It further addresses the Court's role as a global deterrent agent by contributing to the prevention of the commission of atrocity crimes. Finally, Part III argues for increased and continued support from states, the ultimate goal being that the ICC may fully assert itself as a critical global accountability mechanism, thus leading to an enhancement of the Court's perceived legitimacy. If the ICC can carry out a successful investigation in Ukraine that leads to the prosecution and conviction of high-level suspects, states may begin to view the ICC and its ability to deliver justice to victims of atrocities in a new and more favorable light.

I. THE ICC: JURISDICTIONAL REGIME AND STRUCTURAL LIMITATIONS

The ICC has jurisdiction over individuals who have committed any of the most serious international crimes: genocide, crimes against humanity, and war crimes.¹⁵ States that have ratified the Rome Statute agree that the ICC can exercise jurisdiction over any of those crimes if committed by the state's nationals or on their territory.¹⁶ In addition, under Article 12(3) of the Rome Statute, non-States Parties may submit to the Court's jurisdiction over these three crimes on a limited basis.¹⁷ Recently, the Court also obtained jurisdiction over the crime of aggression,¹⁸ though only states that ratify a special aggression amendment face the possibility of an aggression prosecution.¹⁹

The Rome Statute provides for three ways the Court can exercise jurisdiction: (1) States Parties may refer situations to the ICC's Prosecutor; (2) the Prosecutor may initiate investigations *proprio motu*, or on his own motion and with the approval of the Court; and (3) the UN Security Council, acting under Chapter VII of the UN Charter, may refer situations to the ICC when it concludes that one or more crimes

15. Rome Statute, *supra* note 2, arts. 5–8.

16. *Id.* art. 12(1)–(2).

17. *Id.* art. 12(3). As discussed below in this Article, Ukraine filed just such a declaration accepting the jurisdiction of the Court. *See infra* Section III.A.

18. Rome Statute, *supra* note 2, art. 8 bis.

19. *See* Alex Whiting, *Crime of Aggression Activated at the ICC: Does it Matter?*, JUST SEC. (Dec. 19, 2017), <https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter> [<https://perma.cc/WJ6N-RJSS>]. Even if states ratify the aggression amendment, they can opt out of the ICC's aggression jurisdiction. *Id.*

within the Court's jurisdiction have been committed.²⁰ The UN Security Council is not limited to referring situations where the crimes were committed on the territory of a State Party or committed by the national of a State Party.²¹

The ICC, however, was designed as a court of last resort with jurisdiction that is "complementary"—thus recognizing that states have both the responsibility and right to prosecute crimes committed by their nationals and on their territory.²² As set forth in Article 17 of the Rome Statute, a case is only admissible if the Prosecutor proves that the state with domestic jurisdiction over the crimes is "unwilling or unable" to investigate or prosecute.²³ Unwillingness includes instances in which national proceedings are a sham or are otherwise inconsistent with an intention to bring a perpetrator to justice.²⁴ Inability includes instances in which a state, because of the shortcomings of its judicial system, cannot secure the accused, cannot obtain necessary evidence, or is otherwise unable to proceed.²⁵ In general, a state might be unable to proceed within the meaning of the Rome Statute if it lacks sufficient or trained judicial and enforcement personnel, or does not have the required substantive and procedural penal legislation.²⁶

As to the Court's legal processes specifically, several stages precede the trial phase where the guilt of the accused will be adjudicated. Initially, the OTP commences a preliminary investigation, during which it seeks to determine whether there is sufficient evidence of crimes of significant gravity falling within the ICC's jurisdiction and whether opening an investigation would serve the interests of justice and the victims.²⁷ During this phase, and in consideration of the fact that the ICC operates only as a court of last resort, the OTP also looks

20. Rome Statute, *supra* note 2, arts. 13–15.

21. *Id.* arts. 12(2), 13(b).

22. Dragana Radosavljevic, *An Overview of the ICC Complementarity Regime*, 1 USAK Y.B. INT'L POL. & L. 125, 129 (2008).

23. Rome Statute, *supra* note 2, art. 17.

24. *Id.* art. 17(2).

25. *Id.* art. 17(3).

26. See ICC, OFF. OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 15 (2003), <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> [<https://perma.cc/QH7D-ZZKD>].

27. ICC, *Policy Paper on Preliminary Examinations*, at 2 (Nov. 2013), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf [<https://perma.cc/UY59-8843>].

to whether genuine national proceedings are underway.²⁸ The situation will then pass to the investigation stage if the OTP determines there is a reasonable basis to believe that crimes have been committed and proceeding before the ICC is otherwise warranted.²⁹ It is at this investigation stage that the OTP will request that the ICC judges issue arrest warrants or summons to appear.³⁰ If the suspect is arrested or voluntarily appears before the Court, the matter progresses to the pre-trial stage, whereby the ICC judges will decide whether the prosecution has met its burden of establishing that there are substantial grounds to believe that the suspect has committed the charged crimes.³¹ If the prosecution meets this burden, the case will advance to trial where the prosecution will be required to prove the accused's guilt beyond a reasonable doubt.³²

In all phases of its operations, the OTP faces certain institutional structural constraints that limit its ability to investigate and prosecute cases—constraints that are explored in greater detail below.³³ First, its budget is determined by the Assembly of States Parties (“ASP”)—a body comprised of States Parties that provides management oversight and acts as the Court's legislative body.³⁴ The ASP reviews the Court's performance in a variety of aspects, considers the budget requests of its various organs, and then decides whether and to what extent those

28. See, e.g., James Stewart, Deputy Prosecutor, ICC, *Transitional Justice in Colombia and the Role of the International Criminal Court* (May 13, 2015), <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf> [<https://perma.cc/9VV8-7J92>] (explaining that the purpose of the preliminary examination in Colombia was to determine whether national authorities have instituted genuine proceedings against those individuals most responsible for the most serious crimes).

29. See Rome Statute, *supra* note 2, art. 53(1) (discussing the requirements for initiating an investigation).

30. *Id.* art. 58.

31. *Id.* art. 61.

32. See *id.* art. 66(3) (discussing the prosecutor's burden to prove the defendant's guilt beyond a reasonable doubt).

33. See *infra* Section III.A.

34. The ASP is comprised of representatives of states that have ratified or acceded to the Rome Statute. *Assembly of States Parties to the Rome Statute*, ICC, <https://asp.icc-cpi.int> [<https://perma.cc/ZSG3-QRWK>]; see also Rome Statute, *supra* note 2, art. 112(1) (“Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers.”).

budget requests will be granted.³⁵ States Parties are then assessed³⁶ according to the UN scale of Assessments formula, which essentially requires states to pay according to their capacity to do so.³⁷ Because the United States and some other wealthier states are not members of the ICC, the bulk of the ICC's funding is provided by several European countries, as well as Brazil, Canada, and Japan.³⁸ The Court's largest funders have also led the charge to deny increases to the ICC's budget,³⁹ even though as discussed below, the OTP has repeatedly argued that it does not have sufficient resources to fully investigate situations, to move cases beyond the preliminary investigation stage, or to take cases to trial.⁴⁰

A second institutional constraint concerns the ICC's absence of a police force or other enforcement body with powers to mandate

35. See *id.* art. 112(2) (d) (stating that the ASP shall consider and decide the ICC's budget). To fulfill its duties relating to making budget determinations, the ASP created a "Committee on Budget and Finance" comprised of 12 individuals recognized as experts on financial matters. See ICC, *Establishment of the Committee on Budget and Finance*, at 2, ICC-ASP/1/Res.4 (Sept. 3, 2002).

36. Article 115 of the Rome Statute provides that States Parties will contribute to the Court's budget through assessed contributions. Rome Statute, *supra* note 2, art. 115. The Court may also accept voluntary contributions from individuals or entities, including all states. *Id.* art. 116. Voluntary contributions constitute only a small percentage of the Court's budget. See, e.g., ICC, *Financial Statements of the International Criminal Court for the Year Ended 31 December 2020*, at 8, ICC-ASP/20/12 (July 23, 2021) (showing that voluntary contributions represented only 1% of the ICC's budget in 2020).

37. See Rome Statute, *supra* note 2, art. 117 (noting the assessment scale based on the one adopted by the United Nations for its regular budget). The UN formula is based on a calculation that seeks to determine each state's capacity to pay, considering, among other things, the state's gross national income, population, and debt burden. *UN Scales of Assessment: Explaining the UN Budget Formula in 9 Questions*, BETTER WORLD CAMPAIGN, <https://betterworldcampaign.org/us-funding-for-the-un/un-budget-formula> [<https://perma.cc/52AV-HWQ2>].

38. Seven states out of 123 States Parties—Brazil, Canada, France, Germany, Italy, Japan, and the UK—are responsible for funding approximately 60% of the Court's budget. See ICC, *Report of the Committee on Budget and Finance on the Work of its Thirty-Seventh Session*, at 40, ICC-ASP/20/15 (Nov. 8, 2021).

39. Elizabeth Evenson, *The ICC: Too Important to Let Fail*, HUMAN RIGHTS WATCH (Aug. 7, 2015), <https://www.hrw.org/news/2015/08/07/icc-too-important-let-fail> [<https://perma.cc/F99Y-YD3U>] (stating that France, Germany, Italy, Japan, and Britain have led the push to cap the Court's budget, citing the global economic crises and domestic budget crunches).

40. See *infra* Section III.A.

compliance with its requests or Court orders.⁴¹ Per the terms of the Rome Statute, the OTP must turn to states to obtain evidence and for the arrest and surrender of individuals who face charges on the covered crimes.⁴² Though States Parties are required to cooperate with the Court,⁴³ such cooperation has not always been forthcoming, as shown by some examples discussed below.⁴⁴ Nor does the ICC have powerful tools to aid it in enforcing compliance. The Court may issue findings of state non-compliance and refer the matter to the Assembly of States Parties.⁴⁵ It may also refer the matter of non-compliance to the UN Security Council in cases that were referred to the Court by the Council.⁴⁶ Some matters of non-cooperation have been referred under these provisions, but no state compliance has been forthcoming as a result.⁴⁷

41. *How the Court Works*, ICC, <https://www.icc-cpi.int/about/how-the-court-works> [<https://perma.cc/LAUZ-MV7K>].

42. Rome Statute, *supra* note 2, arts. 89, 93; *see also* Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 606 (2007) (explaining the ICC is highly dependent on state cooperation to function properly).

43. Rome Statute, *supra* note 2, art. 86 (“States Parties shall . . . cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”).

44. *See infra* Section II.A.

45. *See* Rome Statute, *supra* note 2, art. 89.

46. *Id.* art. 87(7).

47. For example, in 2015, the government of South Africa permitted former President al-Bashir of Sudan to visit and return to his home country even though, as a party to the Rome Statute, South Africa was required to arrest al-Bashir on the ICC’s warrant charging him with crimes against humanity, war crimes, and genocide. Leila Nadya Sadat, *Why the ICC’s Judgment in the al-Bashir Case Wasn’t So Surprising*, JUST. SEC. (July 12, 2019), <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising> [<https://perma.cc/UT2P-EDFV>] (stating that the government allowed al-Bashir to leave prompting the South African Supreme Court to rule that the state’s obligations to the ICC, which contains no head of state immunity, required the arrest of al-Bashir); *see also ICC Issues Arrest Warrant for Sudanese President al Bashir*, AMNESTY INT’L (Mar. 4, 2009), <https://www.amnesty.org/en/latest/news/2009/03/icc-issues-arrest-warrant-sudanese-president-al-bashir-20090304> [<https://perma.cc/RBF4-VWHT>] (outlining the arrest warrant for al-Bashir). An ICC Pre-Trial Chamber ruled that the South African government had failed to comply with its obligations under the Rome Statute. However, it decided that referring the matter to the UN Security Council was not a realistic way to obtain cooperation because the UN Security Council had not acted on previous referrals of other states that had also declined to arrest al-Bashir. *See* Prosecutor v. Al-Bashir, ICC-02/05-01/09, Decision under Article 87(7) of the Rome Statute on the Non-

II. COMPARING STATE SUPPORT FOR THE ICC BEFORE AND AFTER THE RUSSIAN INVASION

As explained above, the ICC relies on states for support to successfully fulfill its mission of holding perpetrators of mass atrocities accountable: (1) funding and (2) cooperation as relates to the investigation and prosecution of cases. This Part now compares state support for the Court both before and after Russia's invasion of Ukraine before considering whether state responses to the invasion may enhance the Court's perceived legitimacy.

A. *Before The Invasion*

Historically, the evidence indicates that states have not necessarily always, or fully, supported the Court in either of the key areas identified above.

1. *The ICC's Budget Crunch*

First, the ICC's budget is relatively small. Between 2009 and 2019, the ICC's budget ranged from approximately 101 million euros⁴⁸ to approximately 148 million euros.⁴⁹ After 20 years in operation, the ICC's yearly budget stands at approximately 155 million euros.⁵⁰ Though these numbers likely sound significant, it bears noting that investigating and prosecuting international crimes is generally more

Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ¶¶ 107–08, 135–40 (July 6, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF [<https://perma.cc/9NC6-F3WY>].

48. See ICC, Programme Budget for 2009, the Working Capital Fund for 2009, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for the Year 2009 and the Contingency Fund, at 1, ICC-ASP/7/Res.4 (Nov. 21, 2008). As of October 2022, this budget is roughly equivalent to 101.8 million USD. See *Foreign Currency Exchange Rates*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/programs-administration/determining-duty-rates/foreign-currency-exchange-rates> [<https://perma.cc/G9X2-JPC8>].

49. See ICC, *Resolution of the Assembly of States Parties on the Proposed Programme Budget for 2019, the Working Capital Fund for 2019, the Scale of Assessment for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2019 and the Contingency Fund*, ICC-ASP/17/Res.4 (Dec. 12, 2018). As of October 2022, this budget is roughly equivalent to 149 million USD. See *Foreign Currency Exchange Rates*, *supra* note 48.

50. See *About the Court*, ICC, <https://www.icc-cpi.int/about/the-court> [<https://perma.cc/ZYJ4-DZFN>]. As of October 2022, this budget is roughly equivalent to 156 million USD. See *Foreign Currency Exchange Rates*, *supra* note 48.

costly than prosecuting “ordinary” domestic crimes.⁵¹ International crimes are “legally complicated; the cases often include hundreds or thousands of victims, and investigations often take place in conflict or post-conflict states, which has added security risks.”⁵² In addition, investigators and witnesses must travel between the country where the atrocity was committed and the trial location, and documents and testimony must be translated from local languages into the language of the international court.⁵³ Moreover, the ICC is no ordinary international criminal court; it is a permanent court with a mandate to step in to punish perpetrators of mass atrocities when the country which would otherwise have jurisdiction proves unwilling or unable to prosecute.⁵⁴

For example, the ICC’s budget does not compare favorably to the funds allocated to the two ad hoc criminal tribunals for the former Yugoslavia and Rwanda. As former Ambassador-at-Large for the U.S. State Department’s Office of Global Criminal Justice Stephen Rapp notes, in its thirteenth year, the OTP’s budget remained smaller than those of the ad hoc tribunals at comparable times.⁵⁵ In total, states spent approximately 1.8 billion euros on the International Tribunal for Rwanda during the over twenty-one years of its existence.⁵⁶ The tribunals, however, were created by the UN Security Council in

51. David Wippman, Note, *The Costs of International Justice*, 100 AM. J. INT’L L. 861, 862 (2006) (noting that comparing the trials at international criminal tribunals to the criminal trials in domestic jurisdictions is “an apples-and-oranges exercise, since national legal systems for the most part do not handle the kinds of cases prosecuted by the ad hoc tribunals, and operate in a very different legal and political environment”).

52. *The Challenges of Prosecuting Gender-Based Crimes in International Courts*, UNIV. SYDNEY L. SCH. (Dec. 6, 2018), <https://www.sydney.edu.au/law/news-and-events/news/2018/12/06/the-challenges-of-prosecuting-gender-based-crimes-in-international.html> [<https://perma.cc/BSS9-UWZV>].

53. Wippman, *supra* note 51, at 872–73, 877–78.

54. *See supra* notes 15–26 and accompanying text.

55. Stephen J. Rapp, *Overcoming Obstacles to Funding ICC Investigations in UN Security Council Referred Cases*, INT’L CRIM. JUST. TODAY: ARGUENDO (Dec. 10, 2015), <https://www.international-criminal-justice-today.org/arguendo/overcoming-obstacles-to-funding-icc-investigations-in-un-security-council-referred-cases> [<https://perma.cc/EL5D-APYW>].

56. Antonio Cascais, *ICTR: A Failed Tribunal for Genocide Victims and Survivors*, DEUTSCHE WELLE (Nov. 8, 2019), <https://www.dw.com/en/ictr-a-tribunal-that-failed-rwandan-genocide-victims-and-survivors/a-51156220> [<https://perma.cc/9WGE-EL46>]; Alastair Leithhead, *Rwanda Genocide: International Criminal Tribunal Closes*, BBC NEWS (Dec. 14, 2015), <https://www.bbc.com/news/world-africa-35070220> [<https://perma.cc/695M-3QG7>].

response to specific atrocities that occurred in particular geographic locations during a specified time.⁵⁷ As a result, there was also an expectation that tribunals would have a somewhat limited scope of work—that they would “eventually hit a peak and then begin to wind down as they complete their investigations and trials.”⁵⁸ The ICC, by contrast, must prosecute crimes around the globe for the foreseeable future. And since its inception, its case load has multiplied, as it remains the only viable accountability mechanism to address the many atrocities that continue to occur. In fact, Professor Stuart Ford’s research shows that between 2009 and 2013, the Court’s caseload doubled from nine cases to eighteen, even though during that same period, its funding remained essentially unchanged.⁵⁹

The ICC’s budget also fails to compare favorably to the funding that states provide to investigate and prosecute domestic mass atrocity situations (as opposed to ordinary crimes). Professor Stuart Ford illustrates this point with evidence from various domestic mass atrocity investigations, including those concerning the 1988 Lockerbie plane bombing, the 1995 Oklahoma City bombing, and the 2005 London train bombings.⁶⁰ As an initial matter, Professor Ford creates an empirical scale to measure crime gravity based upon his synthesis of the OTP’s work, the Court’s jurisprudence, and the scholarship examining the gravity of crimes in the international and domestic

57. See *International Tribunals*, UN SECURITY COUNCIL, <https://www.un.org/securitycouncil/content/repertoire/international-tribunals> [<https://perma.cc/ST3P-HLCA>].

58. See Stuart Ford, *How Much Money Does the ICC Need?*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 84, 86 (Carsten Stahn ed. 2015).

59. *Id.* at 86–87. It is true that, without adjusting for inflation, the Court’s 2022 budget of 155 million euros exceeds the Court’s 2013 budget of approximately 115 million euros. ICC, *Programme Budget for 2013, the Working Capital Fund for 2013, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2013 and the Contingency Fund*, at 16, ICC-ASP/11/Res.1 (Nov. 21, 2012); ICC, *Resolution of the Assembly of States Parties on the Proposed Programme for 2022, the Working Capital Fund for 2022, the Scale of Assessment for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2022 and the Contingency Fund*, at 1, ICC-ASP/20/Res.1 (Dec. 9, 2021). As of December 2021, though, the ICC’s docket included eleven investigations and sixteen preliminary examinations. Janet H. Anderson, *The ICC In Times of Budget Crunch*, JUST. INFO (Dec. 13, 2021), <https://www.justiceinfo.net/en/85475-icc-times-budget-crunch.html> [<https://perma.cc/XPV2-YP4H>] (quoting ICC Prosecutor Karim Khan).

60. See Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOB. STUD. L. REV. 1, 62 (2017).

context.⁶¹ His conclusion based on all of the above is that the crimes investigated by the ICC are more grave than the atrocity crimes investigated domestically. The reason, he explains:

The crimes typically investigated by the ICC occur in more places and over a longer period of time. They involve more victims of all kinds, including more murder victims, and also regularly involve acts of exceptional cruelty. They involve a number of types of victimization that are not present in the domestic mass atrocity crimes, including rape, torture, unlawful detention, and the forcible displacement of the civilian population. In addition, they have a larger impact on the societies where they occur.⁶²

Nevertheless, Ford's research shows that at peak size, domestic atrocity prosecutions have investigation teams with between 100 and 10,000 personnel who often conduct thousands of witness interviews.⁶³ By contrast, despite pursuing cases that are far more complicated to prove, the ICC's average investigation team has about thirty-five personnel and conducts fewer than 200 witness interviews.⁶⁴ In short, states have devoted significantly more resources to prosecute single atrocity crimes than they are willing to devote to sustaining the ICC in pursuing its broad mandate.

One can also compare the ICC's funding to what states spend on their military—funds which presumably are intended to ultimately ensure peace and stability, like the funds provided to the ICC. The remarks of ICC Judge Chile Eboe-Osuji at an ASP meeting are instructive in this regard. He notes that the world's \$1.7 trillion USD "annual military spending is roughly ten thousand times larger than the budget of the ICC."⁶⁵ He further notes that the ICC's total program budget over sixteen years of operation is less than the \$2.1 billion USD cost of a single "Stealth Bomber."⁶⁶ Others, too, have pointed out the willingness of states to spend on military action—for instance the funds countries spent to impose a no-fly zone over Libya in 2011.⁶⁷

61. *Id.* at 3.

62. *Id.*

63. *Id.* at 63–64.

64. *Id.* at 53.

65. Judge Chile Eboe-Osuji, *supra* note 1, at 9.

66. *Id.*

67. Robbie Corey-Boulet, *Concern Over ICC Funding*, GLOB. POL'Y F. (Sept. 28, 2011), <https://archive.globalpolicy.org/international-justice/the-international-criminal-court/ngos-and-the-icc-6-6/50790-concern-over-icc-funding.html> [<https://perma.cc/EF7W-PDSD>].

Even though the budget is relatively small given the Court's mandate, in the past decade, the ASP has been on a mission to limit increases.⁶⁸ Following the 2008 economic crisis, in fact, some of the Court's largest funders—France, Germany, Italy, Japan, and the UK—launched a campaign to restrict the budget to “zero growth.”⁶⁹ They advocated for no budget increase beyond the previous year's, even if the Court's caseload increased and other costs beyond its control rose.⁷⁰ Despite consistent budget increases every year of the ICC's existence, these powerful and vocal opponents to budget increases were influential. Between 2009 and 2011, the ICC received no budget increase from the ASP despite the fact that the OTP was pursuing investigations in seven countries in 2011, up from four in 2009.⁷¹ The OTP's budget between 2015 and 2020 actually decreased, notwithstanding that it was pursuing nine active investigations in 2020, up from six in 2015.⁷² In 2021, the ASP agreed to increase the ICC's 2022 budget—but by less than half of the 9.5 percent increase requested.⁷³ Indeed, at this point, there “is a perceived capitulation by the Court to stop requesting more money given the unfortunate futility of doing so.”⁷⁴ Yet the OTP receives the bulk of its caseload from state referrals.⁷⁵

Another reason the ICC's budget is constrained relates to the UN Security Council referrals. As Stephen Rapp notes, the “Rome Statute was drafted with the explicit expectation that the costs of [UN Security Council] referrals . . . would be borne by the United Nations [such that those cases would be] on the same footing as at the original *ad*

68. See *Human Rights Watch Briefing Note for the Eighteenth Session of the International Criminal Court Assembly of States Parties*, HUM. RTS. WATCH (Nov. 18, 2019, 12:00 AM), <https://www.hrw.org/news/2019/11/18/human-rights-watch-briefing-note-eighteenth-session-international-criminal-court> [https://perma.cc/9ZNV-YD6G] (noting the move by several countries to push for zero growth in the Court's budget).

69. Jonathan O'Donohue, *Financing the International Criminal Court*, 13 INT'L CRIM. L. REV. 269, 280 (2013).

70. *Id.*

71. Rebecca Hamilton, *Member Countries Fight over International Court's Budget*, REUTERS (Dec. 21, 2011, 3:59 PM), <https://www.reuters.com/article/icc-budget-idAFN1E7BJ0C420111220> [https://perma.cc/KN3G-PDET].

72. See *Human Rights Watch Briefing Note, supra* note 68 (noting a proposed decrease from approximately 60 million to 47 million euros).

73. Anderson, *supra* note 59.

74. Hale, *supra* note 11, at 206.

75. See O'Donohue, *supra* note 69, at 287 (noting that as of 2013, the Court had received “two Security Council referrals, four state referrals and one accepted Article 12(3) declaration by a non-state party”).

hoc tribunals, which . . . benefited from funding out of U.N. member assessments.”⁷⁶ This position is borne out by the language of Article 115 of the Rome Statute concerning the Court’s budget. It specifically references “[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.”⁷⁷ Nevertheless, despite asking the ICC to undertake these expensive, resource-depleting, and time-consuming missions, two resolutions referring the Libya and Darfur matters to the ICC contained language stating that the United Nations would not bear any of the expenses incurred in connection with the referrals.⁷⁸ The denial of funding has not gone unnoticed. William Pace, former Convenor of the Coalition for the ICC (“CICC”), referred to this circumstance of referring without providing funding as an “arrogant and unworkable principle.”⁷⁹ Former ICC Prosecutor Luis Moreno-Ocampo made a similar point, noting that states refer conflicts to the ICC while also asserting that they cannot fund these efforts.⁸⁰

2. *States’ Lackluster Record on Cooperation*

Second, the record on cooperation with the Court in the past has been less than stellar. Five States Parties refused to arrest former President Omar al-Bashir of Sudan—even though, beginning in 2009,

76. Rapp, *supra* note 55; see also Benjamin Duerr, *Not Guilty, Not Acquitted: Kenyan Ruling a Major Setback for ICC*, IPI GLOB. OBSERVATORY (April 11, 2016), <https://theglobalobservatory.org/2016/04/international-criminal-court-kenya-ruto-kenyatta> [<https://perma.cc/SF5X-T9FZ>] (noting that the UN Security Council refused to pay for the investigations into the Darfur situation after referring it to the Court).

77. Rome Statute, *supra* note 2, art. 115(b).

78. See S.C. Res. 1970, ¶ 8 (Feb. 26, 2011) (“Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily; . . .”); S.C. Res. 1593, ¶ 1 (Mar. 31, 2005) (same); see also *UN Security Council: Address Inconsistency in ICC Referrals*, HUM. RTS. WATCH (June 29, 2012), <https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals> [<https://perma.cc/NM39-Z2FB>].

79. Corey-Boulet, *supra* note 67.

80. See Ford, *supra* note 58, at 90 (quoting Prosecutor Ocampo-Moreno). Between 2011 and 2013, the ICC devoted 8 million euros specifically to the Libya situation. *Id.* at 90 n. 26.

the ICC had an active warrant charging him with atrocity crimes.⁸¹ The ICC's arrest warrant charges al-Bashir with playing an essential role in coordinating a plan for government forces to murder, torture, and rape civilians of certain ethnicities.⁸² Still, Kenya, Chad, South Africa, Djibouti, and Uganda welcomed al-Bashir to their countries and allowed him to return to Sudan.⁸³ Indeed, in 2015, the government of South Africa allowed al-Bashir to leave the country despite an order from its own Supreme Court banning al-Bashir's departure on the grounds that failing to arrest him would be contrary to the state's obligations under the Rome Statute.⁸⁴ The matter was referred to the Trial Chamber for a finding of non-cooperation under Article 87(7) of the Rome Statute.⁸⁵ Although the Court concluded that South Africa had failed to abide by its obligations under the Rome Statute, the Trial Chamber ultimately decided not to refer the matter to the UN Security Council, noting that it had not acted on previous referrals relating to states' non-cooperation in arresting al-Bashir.⁸⁶ More than a decade after the ICC issued arrest warrants in the Darfur cases, the ICC did commence a trial against one perpetrator who participated in the

81. See, e.g., *Storm Over al-Bashir's Surprise Visit*, NATION (July 3, 2020), <https://nation.africa/kenya/kenya-referendum/storm-over-al-bashir-s-surprise-visit-735078?view=htmlamp> [<https://perma.cc/9TLX-ZLBE>] (discussing al-Bashir's 2010 visit to Kenya); Xan Rice, *Chad Refuses to Arrest Omar al-Bashir on Genocide Charges*, GUARDIAN (July 22, 2010, 6:24 AM), <https://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir> [<https://perma.cc/XZQ6-SPZU>] (discussing al-Bashir's 2010 visit to Chad); *Uganda and Djibouti to Face UN over al-Bashir*, DEUTSCHE WELLE (July 12, 2016), <http://www.dw.com/en/icc-refers-uganda-and-djibouti-to-un-for-not-arresting-al-bashir/a-19396326> [<https://perma.cc/NP2U-4V9R>] (discussing al-Bashir's 2015 and 2016 visits to South Africa, Uganda, and Djibouti).

82. *Case Information Sheet: The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC (July 2021), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf> [<https://perma.cc/E4C6-VAXR>].

83. See *supra* note 81 and accompanying text.

84. See *supra* note 47 and accompanying text.

85. ICC, OFF. OF THE PROSECUTOR, TWENTY-FOURTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UNITED NATIONS SECURITY COUNCIL PURSUANT TO UNSCR 1593 (2005), at 2 (Dec. 13, 2016), https://www.icc-cpi.int/itemsDocuments/161213-otp-rep-24-darfur_Eng.pdf [<https://perma.cc/4ECU-ESVR>].

86. *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ¶¶ 107–08, 139–40 (July 6, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF [<https://perma.cc/W3W5-35MG>].

atrocities.⁸⁷ The trial, however, was not the result of UN Security Council or member state efforts, but rather because Sudanese citizens eventually revolted against al-Bashir's regime.⁸⁸

The facts surrounding the ICC's Kenya cases provide another example where states' failures to cooperate likely played a role in the ICC's inability to bring justice to atrocity victims. The OTP charged six Kenyans—including Uhuru Kenyatta and William Ruto, who were elected to the country's top leadership positions while the cases were pending—with crimes against humanity for their roles in instigating the inter-ethnic violence that left many dead and displaced following the presidential elections in 2007.⁸⁹ Ultimately, however, the OTP's cases against all six defendants were dropped.⁹⁰ According to the OTP, a primary reason the cases failed was because the Kenyan government—a State Party to the ICC—did not comply with requests to provide documentary evidence and failed to protect ICC witnesses, or even played a role in intimidating them.⁹¹

Kenyan leaders were also successful in persuading the African Union (“AU”) to push non-cooperation with the Court among their

87. Emma DiNapoli & Mohammed Hassan, *Why the ICC's First Trial on Darfur is About More than Securing Justice*, JUST. SEC. (Apr. 4, 2022), <https://www.justsecurity.org/80920/why-the-iccs-first-trial-on-darfur-is-about-more-than-securing-justice> [https://perma.cc/UE6R-84JM].

88. Mark Kersten, *Should the ICC Accept Western Funding for its Probe in Ukraine?*, AL JAZEERA (Apr. 7, 2022), <https://www.aljazeera.com/opinions/2022/4/7/should-the-icc-accept-western-funding-for-its-probe-in-ukraine> [https://perma.cc/4XU6-AWL4]. States similarly failed to execute arrest warrants issued in the Libya cases, the result being that the alleged perpetrators have either died or remain at large. *Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)*, ICC ¶¶ 26–30 (May 17, 2021), <https://www.icc-cpi.int/news/statement-icc-prosecutor-united-nations-security-council-situation-libya-pursuant-unscr-1970-0> [https://perma.cc/WYS9-23KE].

89. See Press Release, ICC, Kenya's Post Election Violence: ICC Prosecutor Presents Cases Against Six Individuals for Crimes Against Humanity (Dec. 15, 2010), <https://www.icc-cpi.int/news/kenyas-post-election-violence-icc-prosecutor-presents-cases-against-six-individuals-crimes> [https://perma.cc/KBU2-84B4].

90. See *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhuru Muigai Kenyatta*, ICC (Dec. 5, 2014), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-withdrawal-charges-against-mr> [https://perma.cc/V79A-X7KH].

91. *Id.*; *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*, ICC (April 6, 2016), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-trial-chambers> [https://perma.cc/G5RH-FDYF].

members. For instance, at Kenya's urging, in October 2013, the AU "decided" that the ICC should suspend its cases Kenyatta and Ruto until the two had left office.⁹² The AU's stance was that the ICC should not try sitting heads of state.⁹³ It took this position undeterred by clear language in the Rome Statute that provides for no head of state immunity⁹⁴ and even though neither Kenyatta nor Ruto were heads of state when the ICC brought charges against them. In February 2016, members of the AU "backed a Kenyan proposal to push for withdrawal from the [Court]."⁹⁵ In February 2017, the AU went further, issuing a non-binding resolution for a "strategy for mass withdrawal" from the ICC.⁹⁶ Although not all African nations backed the move, Kenya, Uganda, and some others strongly pushed the idea.⁹⁷

The AU defended its support for Kenya's proposal to have African states withdraw from the Court, repeating claims that the ICC unfairly targets the continent⁹⁸—a position that has resonated with some constituencies. On the other hand, worth noting is that much of the narrative surrounding the Court's anti-Africa bias was launched by African leaders only after they were targeted by the Court.⁹⁹ The narrative was first advanced after the ICC issued its arrest warrant for

92. African Union, *Extraordinary Session of the Assembly of the African Union, 12 October 2013: Decisions and Declarations*, ¶¶ 10(i)–(ii), Ext/Assembly/AU/Dec.1 (Oct. 2013) (Oct. 12, 2013), https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf [<https://perma.cc/LP2N-Q4M4>].

93. *Id.*

94. Rome Statute, *supra* note 2, art. 27.

95. *African Union Members Back Kenyan Plan to Leave ICC*, *GUARDIAN* (Feb. 1, 2016), <https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court> [<https://perma.cc/4N2S-MHRW>].

96. Robyn Dixon, *African Leaders Amp Up Pressure on the International Criminal Court, With a Plan for Mass Exit*, *L.A. TIMES* (Feb. 1, 2017, 1:33 PM), <https://www.latimes.com/world/africa/la-fg-southafrica-icc-massexit-20170201-story.html> [<https://perma.cc/7Z2D-SYBM>].

97. *Id.*

98. *African Union Members Back Kenyan Plan to Leave ICC*, *supra* note 95.

99. As scholar Mark Kersten has stated, there are reasons to believe that African leaders leveled these criticisms at the ICC "not because they are accurate or based on reality, but because such tropes resonate with many constituencies for political and historical reasons." Mark Kersten, *The Africa-ICC Relationship—More and Less than Meets the Eye (Part I)*, *JUST. CONFLICT* (July 17, 2015), <https://justiceinconflict.org/2015/07/17/the-africa-icc-relationship-more-and-less-than-meets-the-eye-part-1> [<https://perma.cc/2RWW-7Z26>].

al-Bashir,¹⁰⁰ when al-Bashir called the ICC a “colonial court.”¹⁰¹ Former Libyan leader Muammar Gaddafi echoed the sentiment around the time of the AU’s July 2009 summit, asking African states to reject the ICC’s “warped justice” and arguing that the cases before the ICC were a plot by Western powers.¹⁰² Burundi accompanied its movement to withdraw from the ICC with a statement claiming the ICC is an “instrument of powerful countries used to punish leaders who do not comply with the West.”¹⁰³ Notably, Burundi commenced its withdrawal only after the OTP opened a preliminary investigation into allegations that the State’s government was responsible for some of the many deaths which have occurred during ongoing political protests since April 2015.¹⁰⁴ As former ICC Prosecutor Fatou Bensouda has stated, claims of anti-Africa bias fail to consider that the ICC brings these cases to provide justice to African victims when their own states and leaders fail to do so.¹⁰⁵

100. See, e.g., Dan Kuwali, *Africa and the International Criminal Court*, in *AFRICA AND THE WORLD: BILATERAL AND MULTILATERAL INTERNATIONAL DIPLOMACY* 371, 373 (Dawn Nagar & Charles Mutasa eds., 2018) (stating that after the al-Bashir arrest warrant, some African and Arab leaders and other public figures and organizations began arguing that the ICC is a “Western tool designed to subjugate African leaders on the continent while advancing an imperialist agenda”); Rowland J.V. Cole, *Africa’s Relationship with the International Criminal Court: More Political Than Legal*, 14 MELB. J. INT’L L. 670, 671 (2013) (stating that the AU and African leadership began criticizing the ICC as targeting Africans after the issuance of the arrest warrant for al-Bashir).

101. James Verini, *The Prosecutor and the President*, N.Y. TIMES MAG. (June 22, 2016), <https://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html> [https://perma.cc/V4VD-X2D6].

102. *Annan Defends International Court*, KOFI ANNAN FOUND. (Aug. 5, 2009), <https://www.kofiannanfoundation.org/in-the-news/annan-defends-international-court> [https://perma.cc/X3BT-7ALN].

103. *Burundi: ICC Withdrawal Major Loss to Victims*, HUM. RTS. WATCH (Oct. 27, 2016, 12:00 AM), <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims> [https://perma.cc/FP45-EZ5M].

104. Jeffrey Gettleman, *Raising Fears of a Flight from International Criminal Court, Burundi Heads for Exit*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/world/africa/burundi-moves-to-quit-international-criminal-court-raising-fears-of-an-exodus.html> [https://perma.cc/G6M2-DWWC].

105. Esther Addley, *Fatou Bensouda, The Woman Who Hunts Tyrants*, GUARDIAN (June 5, 2016, 10:00 AM), <https://www.theguardian.com/law/2016/jun/05/fatou-bensouda-international-criminal-court-tyrants> [https://perma.cc/L58C-Y947] (quoting Bensouda as stating “[i]f certain people are looking to shield the alleged perpetrators of those crimes, of course they will say we are targeting [African nations].

Amongst non-States Parties, the United States has perhaps been the most visibly non-cooperative—at least during certain Presidential administrations.¹⁰⁶ Although the United States heavily participated in the Rome Conference leading up to the creation of the Court, it ultimately did not ratify the Rome Statute. Most of the U.S.’s objections to the ICC center around the fact that it has an independent prosecutor and concerns that its military personnel who are stationed around the world could become targets of investigations.¹⁰⁷ These concerns led the U.S. to enact the American Service-Members’ Protection Act of 2002 (“ASPA”).¹⁰⁸ ASPA purports to prohibit cooperating with the ICC, and also forbids providing military assistance to States Parties to the ICC that refused to sign bilateral immunity agreements (“BIAs”) precluding the state from surrendering American officials or military personnel to the Court.¹⁰⁹ While some states resisted the pressure to sign BIAs, ultimately more than 100 states succumbed.¹¹⁰ The Obama administration ended the open hostility to

But . . . the victims deserve justice, the victims are Africans, and in the absence of the ICC nobody else is giving them justice”).

106. See generally Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT’L L. 528, 536–37 (2011) (explaining how President Clinton supported the role of the United States as a signatory to the Rome Statute, while his successor, President Bush, “(in)famously ‘unsigned’ the Rome Statute . . . indicative of—and further engendering—the intensity of U.S. dislike for the International Criminal Court”); Megan E. Lantto, Note, *The United States and the International Criminal Court: A Permanent Divide?*, 31 SUFFOLK TRANSNAT’L L. REV. 619 (2008) (discussing both the Clinton Administration’s and the Bush Administration’s apprehensions toward the United States fully ratifying the Rome Statute out of fear that “if the United States were to submit itself to the jurisdiction of the ICC, it would lose its sovereignty and its citizens would lose their constitutional rights”).

107. Lantto, *supra* note 106, at 623.

108. 22 U.S.C. §§ 7421–7433 (2002).

109. According to Section 7423 of ASPA, various forms of assistance to the ICC are prohibited. Among other things, no United States court, agency, or entity of any state or local government may cooperate with the ICC. *Id.* § 7423(b). Nor may any agency of the United States or any state or local government extradite any person from the U.S. to the ICC nor support the transfer of any U.S. citizen to the Court or otherwise “provide support” to the ICC. *Id.* § 7423(d). As to funding, Section 7423(f) states: “Notwithstanding any other provision of law, no funds appropriated under any provision of law may be used for the purpose of assisting the investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien” by the ICC. *Id.* § 7423(f).

110. *International Criminal Court – Article 98 Agreements Research Guide*, GEO. L. LIBR., https://guides.ll.georgetown.edu/article_98 [<https://perma.cc/9KG7-UAQE>] (revised Dec. 2009) (linking to the BIAs entered).

the Court. Among other things, during the Obama administration, the U.S. transferred warlord Bosco Ntaganda to the ICC, after he surrendered to the U.S. embassy in Kigali.¹¹¹ It also voted for the UN Security Council referral of the Libya situation to the ICC.¹¹² During the Trump administration, the hostility returned, with the U.S. even sanctioning members of the Court.¹¹³

B. *After the Invasion*

Since the Russian invasion of Ukraine, however, states are rallying behind the ICC, emphasizing its crucial role in bringing perpetrators of serious international crimes to justice. Even the United States, in fact, is preaching the Court's key accountability function.¹¹⁴

As an initial matter, in the wake of Russia's invasion and the news of the many atrocities being committed, a record-breaking forty-three states¹¹⁵ referred the situation in Ukraine to the ICC for investigation, and ultimately, prosecution.¹¹⁶ As one commentator noted, this

111. *U.S. Confirms Bosco Ntaganda Turned Himself In at U.S. Embassy in Kigali*, REUTERS (Mar. 18, 2013, 2:03 PM), <https://www.reuters.com/article/us-rwanda-warcrimes-usa-confirmation-idUSBRE92H0T620130318> [<https://perma.cc/EA2L-JWUC>].

112. *UN: Security Council Refers Libya to ICC*, HUM. RTS. WATCH (Feb. 27, 2011, 12:42 AM), <https://www.hrw.org/news/2011/02/27/un-security-council-refers-libya-icc> [<https://perma.cc/XN8D-ZAKH>].

113. *See, e.g., Laurel Wamsley, Trump Administration Sanctions ICC Prosecutor Investigating Alleged U.S. War Crimes*, NPR (Sept. 2, 2020, 6:27 PM), <https://www.npr.org/2020/09/02/908896108/trump-administration-sanctions-icc-prosecutor-investigating-alleged-u-s-war-crim> [<https://perma.cc/V6SF-8VRX>] (stating that the administration had leveled sanctions against the ICC's Chief Prosecutor, Fatou Bensouda, during the time period the OTP was investigating alleged war crimes committed in Afghanistan).

114. *See Colum Lynch, America's ICC Amicus Gets Tested by Putin's Alleged War Crimes*, FOREIGN POL'Y (Mar. 15, 2022, 3:13 PM), <https://foreignpolicy.com/2022/03/15/us-icc-russia-invasion> [<https://perma.cc/W22D-RYN9>]; *see also Ukraine: Situation in Ukraine*, ICC, <https://www.icc-cpi.int/ukraine> [<https://perma.cc/EUW7-PJYV>] (noting that in addition to the original thirty-nine states that referred the situation to the ICC, four states later joined, creating a total of forty-three states).

115. The list of referring countries included many located in Europe, but also Australia, Canada, Costa Rica, and Colombia. *Ukraine: Countries Request ICC War Crimes Inquiry*, HUM. RTS. WATCH (March 2, 2022, 4:42 PM), <https://www.hrw.org/news/2022/03/02/ukraine-countries-request-icc-war-crimes-inquiry> [<https://perma.cc/HPV7-JJNV>].

116. *See Ukraine: Situation in Ukraine*, *supra* note 114. Previously the Venezuela situation held the record for the greatest number of referring states when a group of six states banded together to make the referral. *See Statement of the Prosecutor of the*

coordinated effort amongst such a large number of States Parties “reflects the growing alarm among countries about the escalating atrocities and human rights crisis that has gripped Ukraine,” and demonstrates the Court’s essential role in ensuring justice.¹¹⁷ The swift action of these many states allowed ICC Prosecutor Karim Khan to promptly announce the ICC’s launch of an investigation into the crimes being committed in Ukraine.¹¹⁸ Given the ICC’s limited 2022 budget, Prosecutor Khan accompanied his announcement with an appeal, asking states for “additional budgetary support, for voluntary contributions to support all our situations, and for the loan of gratis personnel.”¹¹⁹ As discussed below, states reacted positively to this appeal.

Though not an exhaustive list, in part because funding and other assistance continues to pour in, one can see that states are taking an entirely different stance on the ICC’s budget and resources following Russia’s invasion of Ukraine. For example, in March 2022, the United Kingdom pledged an additional 1 million pounds in funding and war

International Criminal Court, Fatou Bensouda, on the Referral by a Group of Six States Parties Regarding the Situation in Venezuela, ICC (Sept. 27, 2018), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-referral-group-six-states> [<https://perma.cc/LGE2-GTML>].

117. See *Ukraine: Countries Request ICC War Crimes Inquiry*, *supra* note 115 (quoting Human Rights Watch interim international justice director Balkees Jarrah). Statements issued by states similarly emphasize the gravity of the crimes being committed and the ICC’s key accountability role. See, e.g., Press Release, U.K., Can. & Neth., Joint Statement on the Russian Invasion of Ukraine: UK – Canada – Netherlands (Mar. 7, 2022), <https://www.gov.uk/government/news/joint-statement-on-russian-invasion-of-ukraine-uk-canada-netherlands> (vowing to ensure that violations of international law will be prosecuted, including at the ICC); Press Release, Joint Expeditionary Force, Joint Expeditionary Force Leaders’ Statement (Mar. 15, 2022), <https://www.gov.uk/government/news/joint-expeditionary-force-leaders-statement-15-march-2022> (pledging support for the ICC’s investigations into alleged war crimes and vowing to hold Russia accountable for its actions).

118. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, ICC (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> [<https://perma.cc/4BLK-5XLX>].

119. See Alison Smith, *Opening of Ukraine Investigation Should Be a Wake-up Call to Look Again at ICC’s Budget*, COAL. FOR THE INT’L CRIM. CT. (Mar. 7, 2022), <https://www.coalitionfortheicc.org/news/20220307/opening-ukraine-investigation-icc-budget> [<https://perma.cc/5B8M-82GY>].

crimes investigators.¹²⁰ Germany, the Netherlands, and Sweden announced their intent to contribute 2.5 million euros,¹²¹ while Ireland committed an additional 3 million euros to aid the Court.¹²² France promised an additional 500,000 euros and agreed to second two judges and ten investigators.¹²³ The European Union has similarly declared that it would provide additional funding and help with evidence gathering on the ground in Ukraine.¹²⁴ In June 2022, the European Commission announced a 7.25 million euro fund to help the ICC scale up its investigation capacity to respond to the crimes being committed in Ukraine.¹²⁵ Lithuania, Poland, and Ukraine have entered a Joint Investigation Team (“JIT”) agreement, whereby the parties will work together to share evidence and resources to facilitate prosecutions of atrocities committed in Ukraine at the ICC or in the

120. See Press Release, U.K., International Coalition to Support ICC Russian War Crimes Investigation (Mar. 24, 2022), <https://www.gov.uk/government/news/international-coalition-to-support-icc-russian-war-crimes-investigation>.

121. Agence France-Presse, *EU States Give 2.5 MN Euros to ICC for Ukraine War Crimes*, CAMBODIANESS (Apr. 11, 2022), <https://cambodianess.com/article/eu-states-give-25-mn-euros-to-icc-for-ukraine-war-crimes> [<https://perma.cc/9PXM-EHEW>].

122. Press Release, Ir. Dep’t of Foreign Affs., Minister for Foreign Affairs Simon Coveney Announces €3 Million for the ICC (Apr. 14, 2022), <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2022/april/minister-for-foreign-affairs-simon-coveney-announces-3-million-for-the-icc.php> [<https://perma.cc/2VX6-ASMK>].

123. *War in Ukraine: France’s Diplomatic Action*, MINISTRY FOR EUR. & FOREIGN AFFS., <https://www.diplomatie.gouv.fr/en/country-files/ukraine/situation-in-ukraine-what-is> [<https://perma.cc/83QS-TRT4>] (last modified Aug. 2022).

124. *EU to Help ICC Investigate War Crimes in Ukraine — As It Happened*, DEUTSCHE WELLE (Apr. 11, 2022), <https://www.dw.com/en/eu-to-help-icc-investigate-war-crimes-in-ukraine-as-it-happened/a-61427944> [<https://perma.cc/PZM4-PNWZ>].

125. Press Release, Eur. Comm’n, Russian War Crimes in Ukraine: EU Supports the International Criminal Court Investigation with €7.25 Million (June 8, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3543 [<https://perma.cc/LW98-8AKW>].

relevant domestic jurisdictions.¹²⁶ Eurojust¹²⁷ is supporting this JIT with “operational, analytical, legal, and financial assistance.”¹²⁸ With assistance from Dutch investigators, on May 17, 2022, the ICC announced that it had deployed its largest ever team of investigators, forensic experts, and other support staff to Ukraine to investigate atrocity crimes.¹²⁹ Prosecutor Khan further confirmed that twenty-one states had declared they would second national experts to assist the OTP’s work in Ukraine, while twenty states committed to contributing financially to the OTP in the wake of Russia’s invasion.¹³⁰

Finally, even the United States has changed course, with officials in the Biden administration “openly encouraging investigations, including by the ICC, into reports of atrocities by Russian forces in

126. Press Release, Eurojust, Eurojust Supports Joint Investigation Team into Alleged Core International Crimes in Ukraine (Mar. 28, 2022), <https://www.eurojust.europa.eu/news/eurojust-supports-joint-investigation-team-alleged-core-international-crimes-ukraine> [<https://perma.cc/W2SZ-L2EJ>]. Since the creation of the JIT, Estonia, Latvia, Slovakia, and Romania have joined. Press Release, Eurojust, Romania Becomes Seventh Member of Joint Investigation Team on Alleged Core International Crimes Committed in Ukraine (Oct. 13, 2022), <https://www.eurojust.europa.eu/news/romania-becomes-seventh-member-joint-investigation-team-alleged-core-international-crimes> [<https://perma.cc/7ZEG-KC3X>].

127. “Eurojust” stands for the European Union Agency for Criminal Justice Cooperation. Based in The Hague, it is comprised of national judicial authorities that work together to fight organized cross-border crime. *Who We Are*, EUROJUST, <https://www.eurojust.europa.eu/about-us/who-we-are> [<https://perma.cc/TR8E-CHXX>].

128. Press Release, Eurojust, ICC Participates in Joint Investigation Team Supported by Eurojust on Alleged Core International Crimes in Ukraine (Apr. 25, 2022), <https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes> [<https://perma.cc/2RYS-ZJ4Q>].

129. *The ICC Sends Its Largest Team of Investigators Ever Deployed to Ukraine*, TELLER REP. (May 17, 2022, 3:43 PM), https://www.tellerreport.com/news/2022-05-17-the-icc-sends-its-largest-team-of-investigators-ever-deployed-to-ukraine.B116a9_-Pq.html [<https://perma.cc/D2YZ-GY9A>].

130. *ICC Prosecutor Karim A.A. Khan QC Announces Deployment of Forensics and Investigative Team to Ukraine, Welcomes Strong Cooperation with the Government of the Netherlands*, ICC (May 17, 2022), <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine> [<https://perma.cc/24AC-MWK7>]. Prosecutor Khan has stated that the OTP cannot earmark funds specifically for Ukraine, but that instead that office will deploy funds based on his assessment of needs across all situations. Ryan Goodman, *How Best to Fund the International Criminal Court*, JUST SEC. (May 27, 2022), <https://www.justsecurity.org/81676/how-best-to-fund-the-international-criminal-court> [<https://perma.cc/8PHQ-36LY>].

Ukraine.”¹³¹ In March 2022, in fact, the Senate unanimously passed a resolution proposed by Republican Senator Lindsey Graham which, among other things, encouraged ICC member states to petition the ICC to investigate and prosecute Russian atrocities committed in Ukraine.¹³² Moreover, the United States government is apparently considering how it might be able to assist the Court financially without running afoul of the previous legislation referred to above that limits the country’s ability to support the ICC.¹³³ The United States, indeed, has recently backed these statements of support with action. On December 30, 2022, the President signed legislation which amended ASPA to allow support and funding to the ICC for the Ukraine situation if that investigation and prosecution does not involve any U.S. servicemembers or citizens.¹³⁴

III. THE POSSIBILITY OF INCREASED LEGITIMACY

Can the increased level of support for the ICC translate into increased success, and therefore increased perceived legitimacy? This Article is cautiously optimistic—at least if states continue to stand by the Court. This Article will first discuss the possibility of the Court’s increased success as tied to states’ ability and willingness to financially support the ICC. As this Article will argue, and as the Court’s own record demonstrates, adequate support and funding for the Court are necessary pre-requisites to the Court’s ability to carry out successful

131. Lynch, *supra* note 114.

132. Press Release, Off. of Senator Lindsey Graham, *Graham War Crimes Resolution Unanimously Passes Senate* (March 15, 2022), <https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=37BA157B-FDF3-4298-9F3D-FB1B313A54CC> [<https://perma.cc/Z27Y-ZYAB>]; see also Ryan Goodman, *Top Cover: Congressional Republicans Pave Way for US Policy Shift on Int’l Criminal Court*, JUST SEC. (Apr. 13, 2022), <https://www.justsecurity.org/81093/top-cover-congressional-republicans-pave-way-for-us-policy-shift-on-intl-criminal-court> [<https://perma.cc/LAD9-CADD>] (collecting statements of support for the ICC by members of Congress).

133. Goodman, *supra* note 130; see *supra* notes 108–109 and accompanying text.

134. Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, § 7073(b) (“Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity, or from rendering assistance to the International Criminal Court to assist with investigations and prosecutions of foreign nationals related to the Situation in Ukraine, including to support victims and witnesses.”).

investigations and prosecutions. Conversely, this Article will argue that states' unwillingness to support the Court has contributed to the institution's shortcomings and its relatively inefficient conviction record. Then, this Article will discuss how broad and sustained state support and funding can contribute to the ICC's success and also allow the Court to enhance its own legitimacy—by positioning itself as the primary accountability mechanism necessary in the global fight against impunity.

A. *State Support for the ICC: A Pre-Requisite for Successful ICC Investigations and Prosecutions*

Money and resources do not necessarily lead to convictions, but justice cannot be served unless both are adequate. Professor Stuart Ford's research, for instance, shows that to conduct domestic atrocity investigations and prosecutions, states often employ thousands of personnel who interview thousands of witnesses.¹³⁵ The ICC's OTP has had to make do with significantly less. Indeed, in a 2015 blueprint for its future, The Report of the Court on the Basic Size of the Office of the Prosecutor ("2015 Basic Size Report"), the ICC's OTP outlined its views as to *minimum* investigative resources necessary to fulfill its mandate based on the cases before it at the time.¹³⁶ It requested funds to comprise an average investigative team with about thirty-five personnel at peak size to be able to screen about 340 potential witnesses and take about 170 witness statements.¹³⁷ The OTP also explained that interacting with this number of potential witnesses is necessary so that it might yield between fifty to sixty witnesses per case who would later testify at trial.¹³⁸

135. Ford, *supra* note 60, at 54–63; *see also supra* notes 58–62 and accompanying text.

136. ICC, *Report of the Court on the Basic Size of the Office of the Prosecutor*, at 4–5, 13, ICC-ASP/14/21 (Sept. 17, 2015) [hereinafter *Basic Size Report*] (concluding that the OTP required a minimum staffing level of 540 to fulfill its mandates, as compared to the mere 405 staff members working for the Office at the time). The OTP's estimate in 2015 was based on its then-current caseload of six active investigations, nine preliminary examinations, nine hibernated examinations, five cases in pre-trial, five cases in trial, two cases in appeal, and one new situation. *Id.* at 4; *see also supra* notes 65–74 and accompanying text. The OTP's case load has grown since that time. *See Independent Expert Review, supra* note 13, at 40 & n.99.

137. *See Basic Size Report, supra* note 136, at 29–31.

138. *Id.* As Stephen Rapp notes, a surplus of potential witnesses is desirable, especially at the international level as one can expect that some "witnesses will be reluctant to come forward or to follow-through with the expected testimony" due to the risks involved to them and their family. Rapp, *supra* note 55.

As the OTP has explained, to successfully convict suspects of mass atrocity crimes, it needs to collect significant evidence and diversify its sources of evidence—a strategy which requires both time and resources. For example, during the evidence collection phase, the OTP requires collectors to focus on suspects and linkage while also obtaining evidence that relates to the crimes under investigation: how the crimes occurred, the type and level of victimization, and the identification and interview process of witnesses and victims.¹³⁹ The evidence collected must demonstrate the suspect's role, as well as show that he intended to commit the crime in question. To prove linkage, the investigator focuses on proving that the crime is related to higher-level individuals or organized groups.¹⁴⁰ As noted above, proving linkage can be exceptionally difficult, because it requires one to investigate large and hierarchically organized groups and show that “individuals who may be geographically or organizationally removed from the crimes are legally responsible.”¹⁴¹ As to witnesses specifically, the OTP explained that ideally, one must devote approximately four days per witness on average to obtain thorough and useful testimony.¹⁴² The OTP also employs specialized financial investigation teams to determine the financing and logistics required by relevant individuals or organizations to commit the investigated crimes.¹⁴³ In sum, to appropriately investigate the situations before it, the OTP needs adequate funding.¹⁴⁴

However, as described above, the OTP's repeated requests for funding have frequently been denied. Member states denied the OTP's requested budget increase in 2015 despite the OTP's caution that the increase was necessary to avoid “the present unsustainable practice of repeatedly postponing new investigations which must be pursued in accordance with the [OTP]'s mandate, or constantly

139. Ford, *supra* note 60, at 21–24.

140. *Id.* at 23–24.

141. *Id.* at 24.

142. *Basic Size Report*, *supra* note 136, at 29.

143. *Id.* at 45.

144. The OTP requires significant resources during its pre-trial and trial stages as well. For an explanation of human resources necessary during the Pre-Trial stage, see *id.* at 48–50. For an explanation of resources necessary during the trial stage, see *id.* at 53–55.

stripping ongoing activities of critical resources.”¹⁴⁵ Indeed, the total budget approved for the ICC in 2015 was just over 130 million euros, with approximately 39.6 million allocated to the OTP.¹⁴⁶ Seven years later, in 2022, the ICC’s budget is almost 155 million euros,¹⁴⁷ with the OTP allocation totaling approximately 49.5 million euros.¹⁴⁸ This number—49.5 million euros—is significantly smaller than the 60.6 million euro budget which the OTP requested, as necessary, in its 2015 Basic Size Report.¹⁴⁹ As Stuart Ford has explained, because the ICC’s case load includes cases of greater gravity than domestic mass atrocity cases, one should assume that it will also need to spend more to be successful.¹⁵⁰ Nevertheless, as discussed above, the OTP’s 2022 budget is barely above its 2015 budget, and that is without adjusting for inflation—a situation which may help to explain why the OTP argues that it does not have sufficient resources to fully pursue its many cases.

Although one cannot blame all the ICC’s difficulties on budget constraints, the evidence suggests budget difficulties have negatively influenced the OTP’s ability to successfully conclude its cases.¹⁵¹ Without additional resources, the OTP is stretched too thin to appropriately staff the many cases on its docket, requiring it to thus choose which cases to pursue.¹⁵² For example, the September 2020

145. *Basic Size Report*, *supra* note 136, at 3; *ASP 14: Negotiating the 2016 ICC Budget*, COAL. FOR THE INT’L CRIM. CT. (Nov. 13, 2015), <https://cicglobaljustice.wordpress.com/2015/11/13/asp14-the-courts-budget-for-2016-tackling-iccs-capacity-crisis> [<https://perma.cc/2GQL-A52F>]. It is possible that the OTP’s 2015 request for more resources was not fulfilled by member states because it would have required a 33% increase in its staff, as well as 43% increase in the OTP’s 2015 budget. *Id.* at 5. However, one may also argue that the OTP’s Basic Size Report had clearly demonstrated why the OTP needed additional resources and an enlarged budget.

146. ICC, *Resolution on the Programme Budget for 2015, the Working Capital Fund for 2015, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2015 and the Contingency Fund*, at 17, ICC-ASP/13/Res.1 (Dec. 17, 2014).

147. *See About the Court*, *supra* note 50.

148. *See Anderson*, *supra* note 59 (referencing the OTP’s 2022 budget).

149. *Basic Size Report*, *supra* note 136, at 5.

150. Ford, *supra* note 60, at 1–4.

151. *See id.* at 66 (comparing the resources and methods used to investigate various domestic atrocity crimes with the resources and methods used by the ICC to investigate atrocity crimes).

152. Anderson, *supra* note 59; Interview by Michael Knigge with Fatou Bensouda, Chief Prosecutor, ICC (Feb. 7, 2013), <https://www.dw.com/en/icc-prosecutor-lauds-cooperation-with-the-us/a-16583948> [<https://perma.cc/WK5H-QMXU>] (quoting

Report issued by the group of independent experts who the ASP appointed to review the Court's processes ("2020 Independent Expert Report") concluded that the OTP's staff was "stretched over multiple situations" and that "operating on a shoestring budget has severely affected the quality of the OTP's work."¹⁵³ And according to the OTP itself, lack of funding impeded progress on the Burundi investigation, delayed its second Ivory Coast investigation, and has impacted its ability to further pursue the Georgia investigation.¹⁵⁴ Moreover, if not adequately funded, the OTP may have to shift staff from one case to another, resulting in ineffective and inefficient work and diluting prosecutorial efforts.¹⁵⁵ In her statement to the ASP in 2019, former ICC Prosecutor Bensouda told member states that the OTP did not have the operational capacity to progress all of the preliminary examination situations to the investigation stage.¹⁵⁶ The OTP's 2019-2021 Strategic Plan referenced the possibility of further prioritizing cases given that the Office "expects to face an increase in the number of situations under investigation as its ongoing preliminary examinations progress, while resources are unlikely to significantly increase."¹⁵⁷

former Prosecutor Bensouda as stating that "if you just do the math you will see that really there is a need for the state parties to look into the resources that the ICC has to be able to deal with situations adequately and do quality investigations").

153. See OPEN SOC'Y JUST. INITIATIVE & AMSTERDAM L. SCH., IMPROVING THE OPERATIONS OF THE ICC OFFICE OF THE PROSECUTOR: REAPPRAISAL OF STRUCTURES, NORMS, AND PRACTICES 2 (Apr. 15, 2020), https://acil.uva.nl/binaries/content/assets/subsites/amsterdam-center-for-international-law/various/osji-acil_improving-the-operations-of-the-icc-office-of-the-prosecutor--outcome-report_2020-04.pdf [<https://perma.cc/CE7H-8WPB>]; *Independent Expert Review*, *supra* note 13, at 40 (discussing how budget shortfalls lead to staffing shortfalls and negatively impact the ICC's ability to manage its caseload).

154. *Human Rights Watch Briefing Note for the Eighteenth Session of the International Criminal Court Assembly of States Parties*, *supra* note 68.

155. GUÉNAËL METTRAUX, SHIREEN AVIS FISHER, DERMOT GROOME, ALEX WHITING, GABRIELLE MCINTYRE, JÉRÔME DE HEMPTINNE & GÓRAN SLUITER, EXPERT INITIATIVE ON PROMOTING EFFECTIVENESS AT THE INTERNATIONAL CRIMINAL COURT 75–76 (Dec. 2014), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/Ind_Exp_Initiative.pdf [<https://perma.cc/CC78-3MMY>].

156. Fatou Bensouda, Prosecutor of the ICC, Remarks at the Opening Plenary, 18th Session of the Assembly of States Parties (Dec. 2, 2019), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/Prosecutor-OpeningStmnt-ASP18.pdf [<https://perma.cc/RG6F-FZZF>].

157. ICC, OFF. OF THE PROSECUTOR, STRATEGIC PLAN 2019–2021, at 12 (July 17, 2019), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20190726-strategic-plan-eng.pdf> [<https://perma.cc/DX69-436S>].

The OTP has faced similar budgetary constraints in cases referred to the Court by the UN Security Council. In 2014, the Security Council's failure to provide adequate support following the Darfur referral prompted the then-ICC Prosecutor Bensouda to temporarily suspend the investigation, informing the UN Security Council that "[w]hat is needed is a dramatic shift in this Council's approach to arresting Darfur suspects."¹⁵⁸ Regarding the Libya cases, Prosecutor Bensouda explained how "progress in the Libya situation is frustrated and confidence in the ICC is undermined when, year after year, warrants of arrest remain unexecuted," and urged the Council to "take concrete measures to secure the arrest and surrender of suspects."¹⁵⁹

Moreover, as international criminal law expert Professor Megan Fairlie has noted, the Court has faced demands to increase its workload "despite an already crowded docket and a history of inadequate support from the United Nations Security Council."¹⁶⁰ As additional examples, calls had been made for the UN Security Council to refer both the Islamic State¹⁶¹ and the situation in North Korea to the ICC.¹⁶² Pressure had also been levied against the Court to pursue the politically charged situation in Palestine,¹⁶³ despite extraordinary evidentiary, political, and institutional challenges that such a move

158. Press Release, UN Security Council, Amid Growing Brutality in Darfur, International Criminal Court Prosecutor Urges Security Council to Rethink Tactics for Arresting War Crime Suspects, U.N. Press Release SC/11696 (Dec. 12, 2014).

159. U.N. SCOR, 74th Sess., 8523d mtg. at 4, U.N. Doc. S/PV.8523 (May 8, 2019).

160. Megan A. Fairlie, *The Hidden Costs of Strategic Communications for the International Criminal Court*, 51 TEX. INT'L L.J. 281, 290 (2016).

161. Editorial, *The Crimes of Terrorists*, N.Y. TIMES (Apr. 2, 2015), <https://www.nytimes.com/2015/04/03/opinion/the-crimes-of-terrorists.html> [<https://perma.cc/8QXB-R29Y>] (endorsing an appeal made to the UN Security Council to refer the Islamic State to the ICC).

162. Somini Sengupta, *United Nations Security Council Examines North Korea's Human Rights*, N.Y. TIMES (Dec. 22, 2014), <https://www.nytimes.com/2014/12/23/world/asia/united-nations-security-council-examines-north-koreas-human-rights.html> [<https://perma.cc/2DTC-GC4N>] (noting that the UN Commission of Inquiry on North Korea recommended that the UN Security Council refer North Korea to the ICC).

163. Khaled Abu Toameh & Tovah Lazaroff, *Palestinians Attempting to Fast Track War Crimes Suits Against Israel at ICC*, JERUSALEM POST (Apr. 6, 2015, 10:52 PM), <http://www.jpost.com/Arab-Israeli-Conflict/Palestinians-attempting-to-fast-track-war-crimes-suits-against-Israel-at-ICC-396362> [<https://perma.cc/5653-QWLT>].

would likely impose.¹⁶⁴ Thus, one could argue that states and other non-state actors, such as civil society and human rights non-governmental organizations, have imposed unrealistic expectations on the Court while also withholding the resources that the Court needs to reach the necessary prosecutorial goals.

Commentators have also noted the detrimental effect that the ICC's dearth of resources has had on the OTP's ability to bring perpetrators to justice.¹⁶⁵ For example, Stuart Ford's conclusion after comparing the resources states devoted to domestic atrocity prosecutions with those available to the ICC is that its "lack of resources has contributed to the ICC's relative lack of success so far."¹⁶⁶ Stephen Rapp similarly notes that "resource limitations affect the number of cases that the Prosecutor can bring and the prospect of securing sufficient evidence to prove the charges filed."¹⁶⁷ Further, lack of adequate staffing and resources was highlighted as a key challenge for the OTP in the 2020 Independent Expert Report.¹⁶⁸ The Report detailed that the OTP's Prosecutorial Division required at least 30 additional professionals; that the OTP's existing 1:1 ratio of investigative staff compared to prosecutorial staff is inadequate and should be increased to a 3:2 ratio; and that the size of OTP's teams varies significantly, depending in part on "competing demands for resources."¹⁶⁹ Moreover, the Report concluded that the OTP's International Cooperation Section comprised fifteen staff numbers, "while the volume of work has

164. See, e.g., Kevin Jon Heller, *The ICC in Palestine: Be Careful What You Wish For*, JUST. CONFLICT (Apr. 2, 2015), <http://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for> [<https://perma.cc/CV75-DNPL>] (noting that an ICC investigation would alienate superpowers and that Israel would likely hinder access to evidence gathering unless its actors were excluded from the investigation).

165. See Elizabeth Evenson & Jonathan O'Donohue, *The International Criminal Court at Risk*, OPEN DEMOCRACY (May 6, 2015), <https://www.opendemocracy.net/en/openglobalrights-openpage/international-criminal-court-at-risk> [<https://perma.cc/LZ7S-GDNF>] ("[T]he overall budget approach in recent years appears to be having a negative impact on the ICC's ability to address crimes."); Elizabeth Evenson & Jonathan O'Donohue, *States Shouldn't Use ICC Budget to Interfere with its Work*, OPEN DEMOCRACY (Nov. 23, 2016), <https://www.opendemocracy.net/en/openglobalrights-openpage/states-shouldn-t-use-icc-budget-to-interfere-w> [<https://perma.cc/JXM4-K9QK>] (noting the "devastating impact that reductions of resources requested by the Court in previous years have had on the court's capacity to conduct investigations and keep pace with crimes committed at alarming rates in new situations").

166. Ford, *supra* note 60, at 4.

167. Rapp, *supra* note 55.

168. *Independent Expert Review*, *supra* note 13, at 40.

169. *Id.* at 40–41.

increased significantly” and “[t]he number of relevant members of staff was not commensurately increased.”¹⁷⁰ Finally, the Report observed that the Preliminary Examinations Section has only twelve staff members in total, and that the limited staffing is “one of the reasons for the length of [Preliminary Examinations].”¹⁷¹ The Report, however, did not include recommendations to increase the ICC budget—presumably because the ASP had indicated that such recommendations would not be welcomed.¹⁷²

Regarding the Ukraine situation in particular, lack of funding seemingly explains why approximately eight years passed following Russia’s annexation of Crimea and its occupation of Eastern Ukraine without the ICC opening a formal investigation.¹⁷³ In November 2013, protests within Ukraine erupted after former President Viktor Yanukovich made clear he was rejecting Ukraine’s greater integration with the European Union.¹⁷⁴ Yanukovich thereafter fled to Russia on February 22, 2014.¹⁷⁵ Days later, Russia illegally invaded Crimea, and within weeks, annexed it, calling it Russian territory.¹⁷⁶ In April 2014, pro-Russia separatist rebels began seizing territory in Eastern Ukraine

170. *Id.* ¶ 180.

171. *Id.*

172. For example, the ASP’s Committee on Budget and Finance noted favorably in its 35th session in September 2020 that “the budget for the Court had become stable and achieved near zero growth in the most recent five years (2017–2021).” ICC, *Report of the Committee on Budget and Finance on the Work of its Thirty-fifth Session*, at 248, ICC-ASP/19/20 (Sept. 2020), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-20-ENG-OR-vol-II.pdf [<https://perma.cc/S425-CP2M>].

173. Because this situation in Ukraine was not referred by a State Party to the Rome Statute, and because Russia, as a member of the UN Security Council, would veto any referral to the Court, the Prosecutor would have to proceed *proprio motu* (on its own motion). See Rome Statute, *supra* note 2, art. 13(c).

174. Oksana Grytsenko, *Ukrainian Protesters Flood Kiev After President Pulls Out of EU Deal*, GUARDIAN (Nov. 24, 2013, 10:44 AM), <https://www.theguardian.com/world/2013/nov/24/ukraine-protesters-yanukovich-aborts-eu-deal-russia> [<https://perma.cc/4CJG-H99M>].

175. Alexander Baunov, Balázs Jarábik, & Alexander Golubov, *A Year After Maidan: Why Did Viktor Yanukovich Flee After Signing the Agreement With the Opposition?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 25, 2015), <https://carnegiemoscow.org/commentary/59172> [<https://perma.cc/Y7Y8-MYJS>].

176. Steven Pifer, *Crimea: Six Years After the Illegal Annexation*, BROOKINGS (Mar. 17, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation> [<https://perma.cc/RR3A-V3SZ>].

in the Donbas region.¹⁷⁷ By August 2014, the Russian army had invaded eastern Ukraine to support the separatists.¹⁷⁸ Fighting between Ukrainian forces and the Russian-backed separatists continued, despite two so-called Minsk Agreements which were negotiated to stop the fighting.¹⁷⁹ Estimates suggest that between 2014 and early 2022, the fighting in the Donbas resulted over 14,000 deaths.¹⁸⁰

The ICC launched a Preliminary Investigation into the situation in Ukraine after the country filed two declarations accepting the Court's jurisdiction over crimes committed in its territory from February 20, 2014.¹⁸¹ The ICC carried out that investigation with the assistance and cooperation of Ukrainian prosecutorial authorities and NGOs operating in Ukraine, concluding in December 2020 that there was a reasonable basis to believe that a broad range of crimes falling within

177. See Vladimir Isachenkov, *EXPLAINER: The Story Behind Ukraine's Separatist Regions*, AP NEWS (Feb. 21, 2022), <https://apnews.com/article/russia-ukraine-europe-russia-vladimir-putin-moscow-bcd0c04a2aa146e76b7e757f482f27bb> [<https://perma.cc/6WZK-95EX>].

178. Max Fisher, *Everything You Need to Know About the 2014 Ukraine Crisis*, VOX (Sept. 3, 2014, 11:01 AM), <https://www.vox.com/2014/9/3/18088560/ukraine-everything-you-need-to-know> [<https://perma.cc/YB28-YZN4>].

179. See Isachenkov, *supra* note 177.

180. See, e.g., Pifer, *supra* note 176; Rob Picheta, *Russia's War is Ravaging Donbas, Ukraine's Beleaguered Heartland. Here is what the Region Means to Putin*, CNN (May 31, 2022, 8:54 AM), <https://www.cnn.com/2022/04/15/europe/donbas-region-ukraine-war-russia-explainer-intl/index.html> [<https://perma.cc/RPH8-95WN>].

181. Press Release, ICC, *Ukraine Accepts ICC Jurisdiction over Alleged Crimes Committed Since 20 February 2014* (Sept. 8, 2015), <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014> [<https://perma.cc/LWK7-3ZNY>]. Ukraine submitted two different declarations pursuant to Article 12(3) of the Rome Statute which allows states not parties to the Court to accept the Court's jurisdiction on an ad hoc basis. See Rome Statute, *supra* note 2, art. 12(2)–(3); Press Release, ICC, *Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Between 21 November 2013 and 22 February 2014* (Apr. 17, 2014), <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-between-21-november-2013-and-22> [<https://perma.cc/MQ9Y-FAC3>]. For Ukraine's first declaration, see Declaration of the Verkhovna Rada of Ukraine (Feb. 25, 2014), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationVerkhovnaRadaEng.pdf> [<https://perma.cc/N5PD-2J85>]. On September 8, 2015, Ukraine lodged yet another declaration accepting the ad hoc jurisdiction of the ICC with respect to alleged crimes committed in eastern Ukraine and Crimea since February 20, 2014. Declaration of Verkhovna Rada of Ukraine (Feb. 4, 2015), https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf [<https://perma.cc/HU7R-WDUG>].

the Court's jurisdiction had been committed in Ukraine.¹⁸² Although it is unclear why this investigation took almost five years, it is reasonable to infer that budget constraints played a significant role in limiting the OTP's ability to carry out its work efficiently.¹⁸³ For example, the OTP took eighteen months to determine whether to seek the Pre-Trial Chamber's authorization to initiate an investigation into the situation in Ukraine, ultimately concluding in 2015 not to proceed with the investigation of the alleged Maidan crimes.¹⁸⁴ Several years later, in December 2020, then-Prosecutor Bensouda issued a statement concluding that there is reasonable basis to believe that a broad range of conduct constituting war crimes and crimes against humanity had been committed, that these crimes were of sufficient gravity, and that the case was likely admissible.¹⁸⁵ In the same statement, Prosecutor Bensouda explicitly referenced "limitations of [the Court's] operational capacity due to thin and overextended resources" and the "need to take several strategic and operational decisions on the prioritisation of the Office's workload" to explain why the Ukraine

182. Iryna Marchuk & Aloka Wanigasuriya, *The ICC Concludes its Preliminary Examination in Crimea and Donbas: What's Next for the Situation in Ukraine?*, EJIL:TALK! (Dec. 16, 2020), <https://www.ejiltalk.org/the-icc-concludes-its-preliminary-examination-in-crimea-and-donbas-whats-next-for-the-situation-in-ukraine> [<https://perma.cc/4ZMM-J7Z7>].

183. It is important to note that the Independent Expert Review has criticized the OTP for the excessive length of its preliminary examinations but has acknowledged that the OTP's investigative divisions had "limited resources." *Independent Expert Review*, *supra* note 13, ¶ 719.

184. Iryna Marchuk, *No Crimes Against Humanity During the Maydan Protests in Ukraine? Or the ICC Prosecutor's Flawed Interpretation of Crimes Against Humanity?*, 35 B.U. INT'L L.J., 39, 44–45 (2017). According to the Rome Statute, the OTP conducts a preliminary examination and may initiate it on the basis of: 1) information sent by individuals, groups, or states; 2) referral from a State Party or the UN Security Council; or 3) a declaration lodged by a state accepting the Court's jurisdiction under Article 12(3) of the ICC Statute. *Preliminary Examinations*, ICC, <https://www.icc-cpi.int/situations-preliminary-examinations> [<https://perma.cc/NP3C-MXQL>]. In cases where the Prosecutor initiates an investigation *proprio motu*, he or she must seek Pre-Trial Chamber authorization to proceed with the investigation. Rome Statute, *supra* note 2, art. 15. If the OTP determines that there is reasonable basis to proceed with an investigation into a particular situation, the OTP will proceed with the investigation and will request ICC judges to issue an arrest warrant against a suspect or a summons to appear (where the suspect appears voluntarily). See *How the Court Works*, *supra* note 41.

185. *Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination in the Situation in Ukraine*, ICC (Dec. 11, 2020), <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine> [<https://perma.cc/R2GT-W8J9>].

situation would not be moving promptly to the investigation stage.¹⁸⁶ In other words, consistent with the OTP's repeated warnings to the ASP that absent additional funding some cases would have to be deprioritized, the Ukraine case was being deprioritized.¹⁸⁷

In sum, one can dream that the OTP can continue to expand its docket to provide justice to the many victims of the world's atrocities, but as ICC Prosecutor Khan recently stated when referring to budget constraints: "there's a degree of realism everybody needs to get."¹⁸⁸ Absent broad state support allowing for adequate funding, the Court can only conduct small-scale investigations and pursue a limited number of cases, thus falling short of its own mission of contributing to the global fight against impunity.

*B. Broad State Support for the ICC and the Possibility of
Increased Legitimacy*

This Article suggests that if states continue to provide support to the ICC, not only for the Court's Ukraine investigation, but also more broadly for all its situations, cases, and overall functioning, the Court will have a higher likelihood of success in terms of bringing a significant number of those accused of atrocity crimes to justice and obtaining convictions. To enhance its own legitimacy, the Court must be successful, not only in its Ukraine investigation but in the other cases it pursues. This Article argues that the Ukraine crisis presents an opportunity for the Court to demonstrate to states that it deserves adequate funding, support, and cooperation. If states provide the needed support, the Court will be able to exercise its investigative and prosecutorial functions and to contribute to closing the accountability gap by bringing perpetrators of atrocities to justice, as well as by deterring the commission of future crimes. Increased state support for the ICC will likely enhance the Court's legitimacy and position the Court as a permanent agent of global accountability.

1. States Should Provide General Financial Support to the ICC

It is commendable that states have been willing to give money and second investigators to the OTP following the Russian invasion. As

186. *Id.*

187. See *Basic Size Report*, *supra* note 136, ¶ 3 (noting that the OTP was seeking to establish a Basic Size to ensure that the Office could absorb new demands without continuously postponing new investigations).

188. Anderson, *supra* note 59 (quoting Prosecutor Khan).

discussed above, in March 2022, considering the Russian invasion of Ukraine, numerous states referred the Ukraine situation to the Court, and ICC Prosecutor Khan announced that his office would launch an investigation.¹⁸⁹ As also discussed above, states pledged additional support to the Court for the Ukraine investigation, which has helped the OTP in its ongoing investigation.¹⁹⁰

Funding the Court and all its organs more generally, however, is critically important. As it stated the 2015 Basic Size Report, the OTP needs its own augmented and trained staff so that it can efficiently and effectively plan for and staff all its cases¹⁹¹—and it needs even more resources now with its growing caseload.¹⁹² The other organs of the Court also need additional financial backing to function properly.¹⁹³ For example, if OTP activities grow, the Registry will need additional resources.¹⁹⁴ Even prior to the Russian invasion of Ukraine, at the beginning of 2022, ICC Registrar Peter Lewis indicated that his office was facing a busy year; he detailed the Registry's overburdened workload, including "five cases at trial stage, an unprecedented scale of victim participation in some of those cases, and unprecedented reparations work with the Court's trust fund" for victims.¹⁹⁵ With the opening of the Ukraine investigation, the Registry will certainly face a heightened workload and will require an adequate level of human and operational resources, as well as additional funding to address potential cybersecurity threats.¹⁹⁶ The Registry is just one example. For the Court to function properly overall, the totality of its operational and logistical divisions must be appropriately staffed and financed. In fact, the 2020 Independent Expert Report acknowledged staffing and resources as a key internal challenge for the Court.¹⁹⁷

189. See *supra* notes 112–116 and accompanying text.

190. See *supra* notes 112–116 and accompanying text.

191. *Basic Size Report*, *supra* note 136, ¶¶ 3–4.

192. See *supra* Section I.A.1.

193. *Basic Size Report*, *supra* note 136, ¶ 87.

194. *Id.*

195. Goodman, *supra* note 130.

196. *Id.* ("The offices of the prosecutor and registry will also face increased cybersecurity costs since the prosecutor is now pursuing actors with sophisticated hacking capabilities and a criminal record of using them against international organizations.")

197. *Independent Expert Review*, *supra* note 13, ¶ 350 ("The Experts took note of the liquidity crisis facing the Court."). Interestingly, the Independent Expert Review acknowledged that in light of limited funding available for the Court, many had

States should be commended for currently supporting the ICC in the wake of the Russian invasion. But this Article agrees with those commentators who argue that states should not be selectively contributing to the Court.¹⁹⁸ Every situation the Court investigates involves mass atrocities and scores of innocent victims who will likely receive no justice if this Court of last resort does not deliver it. Earmarking funds for the Ukraine situation creates a perception of partial justice and of ICC bias in favor of investigations that may be perceived to be more politically salient. As Todd Buchwald has observed, “[t]he Court has much at stake in being seen as making decisions without fear or favor, based solely on the law and the evidence, and it wants to avoid feeding any accusations of having bent to the political priorities of particular patrons in the selection of cases that it eventually decides to pursue.”¹⁹⁹ Moreover, as Mark Kersten argues, states have an opportunity to demonstrate support for the ICC’s Ukraine investigation while also contributing adequate funding to the Court generally: “Not doing so now would risk entrenching a two-tier system of international justice The challenge—to states and the ICC—is to make the unprecedented the precedent, the exceptional in Ukraine the norm for all.”²⁰⁰ ICC Prosecutor Khan has similarly rejected the possibility of earmarking funds for the Ukraine situation, and has instead explained that any received funds would be deployed across all situations.²⁰¹ International Criminal Law expert Professor Rebecca Hamilton has endorsed Prosecutor Khan’s position,

recommended that the Court focus on a narrower range of situations of the highest gravity. Such a narrowing of the Court’s focus is somewhat contradictory with the repeated criticism of the Court as inefficient due to its low conviction rate. For a fuller discussion, see Todd Buchwald, *Part I: What Kinds of Situations and Cases Should the ICC Pursue? The Independent Expert Review of the ICC and the Question of Aperture*, JUST. SEC. (Nov. 30, 2020), <https://www.justsecurity.org/73530/part-i-what-kinds-of-situations-and-cases-should-the-icc-pursue-the-independent-expert-review-of-the-icc-and-the-question-of-aperture> [<https://perma.cc/RBF6-JD64>] (discussing the various factors to consider in order to implement the recommendation that the Court narrow the range of issues it focuses on).

198. See, e.g., *Victims Could Lose Out with States’ Double-Standard on International Criminal Court Resources*, COAL. FOR INT’L CRIM. CT. (Mar. 30, 2022), https://coalitionfortheicc.org/news/20220330/OpenLetter_ICCresources [<https://perma.cc/ZH3C-F9HG>] (pleading for states to support the ICC with additional funding to ensure it has resources to fully investigate and prosecute all of the cases before it).

199. Goodman, *supra* note 130.

200. Kersten, *supra* note 88.

201. Goodman, *supra* note 130.

stating that “[t]he ICC is rightly taking the position that states cannot support its work on an à la carte basis.”²⁰² With adequate general funding, staff, and support from states, the ICC can deliver broad justice and position itself as a crucial instrument of international criminal justice, in an era where such justice may be seen as a necessary ingredient of atrocity prevention.

Moreover, should states selectively support the Court only in certain politically salient cases, they preclude the OTP from fulfilling its own duties to independently and without bias select and prioritize cases. The OTP’s own Policy Paper on Case Selection and Prioritisation (“Policy Paper”) specifies that the OTP shall conduct its case selection and prioritization based on the “overarching principles of independence, impartiality and objectivity.”²⁰³ According to the Policy Paper, “[i]ndependence goes beyond not seeking or acting on instructions: it means that decisions shall not be influenced or altered by the presumed or known wishes of any external actor.”²⁰⁴ Impartiality “means that the [OTP] will apply consistent methods and criteria irrespective of the States or parties involved or the person(s) or group(s) concerned.”²⁰⁵ Finally, objectivity is understood to mean that “the office will select and pursue cases only if the information and evidence available or accessible to the Prosecution . . . can reasonably justify the selection of a case.”²⁰⁶ Prioritizing cases based solely on a criteria of “available resources” would thus run counter to the OTP’s own selection and prioritization policy²⁰⁷ and counter to what states had expected of the ICC when they negotiated the Rome Statute, which specifically conceived of the OTP as an independent prosecutorial body, free of political influence.²⁰⁸ Thus, although the

202. *Id.*

203. ICC, OFF. OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 16 (Sept. 15, 2016), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [<https://perma.cc/D7F4J3W4>].

204. *Id.* ¶ 17.

205. *Id.* ¶ 19.

206. *Id.* ¶ 21.

207. Although the OTP’s Policy Paper on Case Selection and Prioritisation recognized that insufficient resources limit the number of cases that the OTP can investigate and prosecute, the Policy Paper did not include the availability of resources as a guiding principle in terms of case selection and prioritization.

208. *See, e.g.*, EILEEN SKINNIDER, INT’L CTR. FOR CRIM. L. REFORM & CRIM. JUST. POL’Y, ENSURING THE INDEPENDENCE OF THE INTERNATIONAL CRIMINAL COURT 4–5 (Mar. 2006),

Court desperately needs financial support, selective support earmarked for Ukraine only runs the risk of undermining the OTP's efforts to adequately prioritize case selection and will likely weaken the Court's legitimacy in the eyes of those who are seeking unbiased justice.

2. *States Should Cooperate with the ICC*

Beyond sustained and general funding to support all the Court's organs, the Court also needs states to cooperate with it during its investigations. It has no police force to arrest perpetrators who hide beyond national borders; instead, it depends on states to arrest and bring suspects to The Hague to stand trial.²⁰⁹ Commentators have already pointed out the difficulty the ICC will face in obtaining custody over Putin or other high-level officials involved in the atrocities being committed in Ukraine.²¹⁰ The ICC must be able to count on states to

<https://icclr.org/wp-content/uploads/2019/06/ES-paper-ICC-and-China.pdf?x64956> [<https://perma.cc/UU2Z-DAT2>] (noting how, in the original negotiations establishing the ICC, the Prosecutor's ability to initiate cases *proprio motu* was regarded as an essential way to enhance the Prosecutor's independence and ensure "that he act upon behalf of the international community and not just on request of a particular State or the Security Council"); see also Rome Statute, *supra* note 2, art. 15(1) (granting the Prosecutor the authority to launch investigations *proprio motu*).

209. *State Support*, COAL. FOR ICC, <https://www.coalitionfortheicc.org/fight/state-support-and-cooperation> [<https://perma.cc/4L43-BEMP>] (noting that for the Court to function properly, "states must arrest ICC fugitives, protect victims and witnesses and ensure the Court has the human and financial resources it needs"). The ICC itself has noted that need for states' cooperation. See ICC, RECOMMENDATIONS ON STATES' COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT (ICC): EXPERIENCE AND PRIORITIES (2022), <https://www.icc-cpi.int/sites/default/files/2022-04/66-Recommendations-Flyer-ENG.pdf> [<https://perma.cc/LT48-TZ2U>] ("Without cooperation the ICC cannot function, because it relies on its States Parties as its enforcement pillar."). For a detailed analysis of the ICC's dependency on state cooperation, see generally Valerie Oosterveld, Mike Perry & John McManus, *The Cooperation of States with the International Criminal Court*, 25 FORDHAM INT'L L.J. 767 (2002).

210. See, e.g., Zachary B. Wolf, *Here's How War Crimes Prosecutions Work*, CNN (Apr. 11 2022, 9:18 AM), <https://www.cnn.com/2022/03/03/politics/putin-war-crimes-russia-ukraine-us-what-matters/index.html> [<https://perma.cc/E8TC-QGGM>] (stating that it is unlikely that Putin would be handed over by Russia or arrested while on foreign territory); Jacqueline Thomsen & Mike Scarcella, *Explainer: How Could Russia's Putin Be Prosecuted For War Crimes in Ukraine?*, REUTERS (Apr. 4, 2022, 5:41 AM), <https://www.reuters.com/world/how-could-russias-putin-be-prosecuted-war-crimes-ukraine-2022-03-22> [<https://perma.cc/65M8-PKZP>] (stating that Moscow is certain to

arrest and deliver any suspects who are in or travel to their territory. Member states have the legal obligation to arrest suspects found on their territory. Although neither Russia nor Ukraine are members of the ICC, and although a third state would incur the significant political and security risks associated with arresting Putin or another Russian leader if they were to travel to such a third state, all States Parties are legally bound by the Rome Statute and have the express obligation to arrest ICC suspects found on their territory.²¹¹ States should abide by this legal obligation. A repeat of the situation where many states ignored the arrest warrant for former Sudanese President al-Bashir cannot be tolerated if justice is to be served.²¹²

3. *The ICC Can Act as a Global Deterrent with State Support*

With financial support and cooperation, the ICC may be able to bring perpetrators to justice more swiftly, and thereby increase the possibility of preventing future atrocities—as would-be perpetrators see that their criminal behavior will be punished.²¹³ In other words, the potential deterrent effect, and the resulting peace and stability in the world community at large, should be reason enough for states to invest—and continue to invest—in the ICC.²¹⁴

Deterrence theory posits that a well-designed criminal justice system will deter individuals from committing crimes.²¹⁵ Such a system would

refuse to comply with arrest warrants and that the ICC will have to track defendants to see if they travel to countries where they can be arrested); Ellen Ioanes, *Here's What the ICC Can Actually Do About Putin's War Crimes*, VOX (Apr. 9, 2022, 4:58 PM), <https://www.vox.com/23017838/international-criminal-court-icc-putin-war-crimes> [<https://perma.cc/99DH-CGTZ>] (“[B]ecause the [C]ourt doesn’t have a mechanism like a police force to enforce its arrest warrants, Putin could evade capture as long as he stays in Russia or other friendly nations – and in power.”).

211. Rome Statute, *supra* note 2, art. 89 (requiring member states to cooperate with the ICC in the execution of arrest warrants by surrendering persons found on their territory).

212. *See supra* text accompanying notes 80–85.

213. *See* Yvonne M. Dutton & Tessa Alleblas, *Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya*, 91 ST. JOHN’S L. REV. 105, 110–15 (2017) (explaining deterrence theory and support for the theory in the context of the ICC).

214. Judge Chile Eboe-Osuji, *supra* note 1, at 10 (stating in remarks to the ASP that “investment in justice, such as is administered in this Court, is an investment in the peaceful and stable future we want for our shared humanity”).

215. *See, e.g.,* Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 744 (1998) (noting that the ICTY served a deterrent function by contributing to the

provide both specific deterrence, which assumes that those who have been sentenced in the past will avoid committing crimes in the future to avoid being punished again, and general deterrence, which is the idea that society at large will be generally deterred from committing crimes to avoid punishment.²¹⁶ “Deterrence theory supposes that individuals will refrain from committing crimes when the potential benefits of criminal behavior are outweighed by the potential for *legal* sanctions that are sufficiently (1) certain, (2) severe, and (3) swift.”²¹⁷ In the context of international criminal justice, scholars have cited deterrence as one of the reasons for the creation of international courts and other accountability mechanisms. International criminal law expert Professor Bassiouni, for example, has argued that international accountability measures “serve as deterrence, and thus prevent future victimization.”²¹⁸ ICC supporters have expressed a similar sentiment. In fact, the Rome Statute’s Preamble itself emphasizes the Court’s deterrent role by stating the determination to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”²¹⁹ Then-United Nations Secretary General Kofi Annan has similarly expressed support for the premise that the ICC would have a globally deterrent effect.²²⁰ And the ICC’s first prosecutor noted that the Court’s mission is to end impunity for mass atrocities “in order to contribute to the prevention of future crimes.”²²¹

Of course, not all commentators agree that the ICC and other international tribunals can prevent future crimes through the threat

transformation of popular values in the former Yugoslavia and by acting as a bulwark against the widespread culture of impunity in the international community); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 588–89 (2005) (discussing deterrence theory as applied to international criminal tribunals).

216. Dutton & Alleblas, *supra* note 213, at 110.

217. *Id.* at 111.

218. M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS. 9, 18 (1996).

219. Rome Statute, *supra* note 2, at Preamble.

220. James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact*, 54 VILL. L. REV. 1, 10 (2009) (“We hope [the ICC] will deter future war criminals and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity.”) (alteration in original) (citation omitted).

221. *Pursuing International Justice: A Conversation with Luis Moreno-Ocampo*, COUNCIL ON FOREIGN RELS. (Feb. 4, 2010), <https://www.cfr.org/event/pursuing-international-justice-conversation-luis-moreno-ocampo> [<https://perma.cc/QMR3-Z6A2>].

of punishment. Some such critics have argued that the types of individuals facing prosecution at international tribunals are not rational actors who could be deterred.²²² Others have focused on the mass atrocity context, where large swaths of society participate in committing heinous crimes, and have argued that within such paradigms social deterrence may have limited or no relevance.²²³ Others emphasize that the cost-benefit calculus does not point in favor of deterrence, as those who commit atrocity crimes perceive the risk of eventual prosecution at an international tribunal as slight, both because of international tribunals' selectivity and because of their inability to arrest suspects without adequate state cooperation.²²⁴ Finally, additional critics have emphasized that a focus on international criminal justice might impede prospects for peace in some situations.²²⁵

Despite such criticism, however, some evidence shows that the ICC had produced a deterrent effect. First, the Court has successfully investigated a number of situations, prosecuted several individuals, and issued dozens of arrest warrants.²²⁶ Thus, “[f]or individuals who were accustomed to the status quo of impunity and considered themselves ‘untouchable,’ the risk of investigation and prosecution has

222. See, e.g., Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q. 624, 628 (2009) (“Some would argue that the all-consuming primordial hatreds that motivate genocide defy the simplistic rationalist assumption of cost-benefit calculus by perpetrators upon which modern deterrence theories are based.”); see also Frédéric Mégret, *Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project*, 12 FINNISH Y.B. INT’L L. 193, 202–03 (2001) (discussing realist critiques of deterrence theory).

223. See, e.g., Pádraig McAuliffe, *Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law*, 10 N.Z. J. PUB. & INT’L L. 227, 238 (2012) (noting that the most serious international crimes are collective and therefore unlikely to create a sense of individual responsibility).

224. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 832 (2006) (arguing that international criminal tribunal prosecutions are not likely to produce any meaningful deterrent effect because of the small numbers of persons prosecuted and because the tribunals face constraints in administering sanctions); see also Greenawalt, *supra* note 42, at 606 (arguing that the ICC’s jurisdictional limitations and its dependence on states present impediments to the court’s ability to obtain jurisdiction over offenders).

225. See Dutton & Alleblas, *supra* note 213213, at 117–18 (describing the scholarly “peace versus justice debate” in the context of ICC’s role in deterring the commission of atrocity crimes).

226. *Id.* at 121–22.

increased.²²⁷ Second, the ICC's complementarity regime increases the Court's deterrent effect by encouraging domestic prosecutions.²²⁸ In fact, over the past two decades, the OTP has used different tools and strategies to encourage national proceedings through its preliminary examinations, which have included sending in-country missions and holding consultations with national-level authorities and NGOs.²²⁹ The OTP has also issued public statements during the course of its preliminary examinations to warn perpetrators of the ICC's interest and the potential of a domestic or international criminal prosecution, thereby playing a role in the prevention and deterrence of atrocities.²³⁰ Third, some studies conducted by academics have concluded that the ICC investigation in Uganda has led to a decrease of violence and compelled Joseph Kony to negotiation, and that the threat of ICC prosecution has contributed to diffusing the explosive situation in the Ivory Coast.²³¹ Some research also demonstrates that the ICC's intervention in Kenya by bringing prosecutions produced a deterrent effect in the country.²³²

In sum, this Article argues that the ICC can effectively deter at least some individuals, and that, by joining the ICC, states have increased the threat of both domestic and international prosecutions.²³³ The ICC, however, can only produce this deterrent effect if it has the resources and support that will allow it to successfully prosecute suspects—an outcome that this Article suggests has been previously hampered, at least in part, by states' lack of consistent support.

227. *Id.* at 122.

228. *See* Rome Statute, *supra* note 2, art. 17 (providing that the ICC may exercise jurisdiction over the covered crimes only if the state is "unwilling or unable genuinely" to proceed domestically); *see also supra* notes 22–26 and accompanying text.

229. The OTP has referred to this process of encouraging national prosecutions as its "positive approach to complementarity." ICC, OFF. OF THE PROSECUTOR, PROSECUTORIAL STRATEGY 2009-2012, at 5 (Feb. 1, 2010), <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> [<https://perma.cc/32VJ-PV9V>].

230. Dutton & Alleblas, *supra* note 213, at 124–25.

231. Akhavan, *supra* note 222, at 640–43.

232. *See* Dutton & Alleblas, *supra* note 213, at 149–51 (describing the effects of ICC's role on Kenyan institutions).

233. This Article recognizes that the ICC's deterrent effect varies from situation to situation, and that it has to be nuanced based on domestic political context, the type of actor that the ICC is targeting, as well as the level of ICC's intervention. *See* Dutton & Alleblas, *supra* note 213, at 128.

4. *States Must Support the ICC to Demonstrate International Community's Commitment to Atrocity Prevention*

States have shown, thus far, that they recognize the danger the Russian invasion poses not only for Ukraine, but for the world at large, and that swift accountability for such actions is required. Since World War II, the world has not witnessed such blatant aggression—a fact recognized by the United Nations General Assembly.²³⁴ Since the start of the invasion, tens of thousands of soldiers and civilians have died; over 13 million Ukrainians have been displaced; Russia has occupied approximately 20 percent of Ukrainian land; and Ukraine has suffered tremendous economic harm.²³⁵ Moreover, credible reports indicate that Russian soldiers have committed numerous war crimes, such as torturing and mistreating civilians, rape and other crimes of sexual violence, and that Russian forces have conducted indiscriminate

234. See G.A. Res. ES-11/1, at 2 (Mar. 2, 2022) (“Recognizing that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war.”); see also Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022), <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine> [<https://perma.cc/84LD-49KY>] (“Russia’s aggressive war against Ukraine is one of the clearest violations of article 2(4) of the United Nations Charter [prohibiting the use of threat of force against other states] since its entry into force.”). It is important to note that states have used force against each other since World War II on multiple other occasions. For example, states have used force on the territory of other states for the protection of their own nationals (Great Britain used force in Egypt during the 1956 Suez Canal crisis; Israel used force in Uganda to release Israeli hostages from a hijacked plane in Entebbe; the United States used force in Iran to rescue hostages from the U.S. Embassy). Moreover, states such as the United States and the USSR have used force against other states to support specific types of political regimes during the Cold War. States have also used force under the guise of self-defense or citing humanitarian intervention as a reason to intervene militarily against another state. Notably, the United States used force against Iraq in 2003 claiming that Iraq had weapons of mass destruction. For a detailed discussion of states’ uses of force since World War II, see Milena Sterio, *Humanitarian Intervention Post-Syria: Legitimate or Legal?*, 40 BROOK. J. INT’L L. 109, 119–26 (2014).

235. Julian Hayda, Ashley Westerman, Elissa Nadworny & Claire Harbage, *6 Key Numbers that Reveal the Staggering Impact of Russia’s War in Ukraine*, NPR (Aug. 24, 2022, 1:59 PM), <https://www.npr.org/2022/08/24/1119202240/ukraine-russia-war-by-numbers> [<https://perma.cc/E9UM-YY3Q>].

attacks targeting hospitals, shopping centers, and other civilian targets.²³⁶

States expended significant resources in seeking a negotiated solution to Russia's 2014 annexation of Crimea and its occupation of Ukraine's Donbas region.²³⁷ Eight years later, instead of honoring obligations set out in two separate peace agreements, Putin invaded Ukraine.²³⁸ If the international community fails to respond swiftly and strongly in a coordinated fashion to Putin's war, including by backing accountability mechanisms, it risks further emboldening Putin. In fact, after Russia invaded Crimea and occupied the Donbas region, the international community reacted anemically and failed to threaten Putin's regime with concrete legal sanctions.²³⁹ While the ICC launched a preliminary investigation into Ukraine, as described above, the investigation lingered and the OTP, in part due to lack of financial support, announced that it would not prioritize this situation.²⁴⁰ If states fail to support the ICC now, in the wake of Russian invasion and in the face of dozens of state party referrals of this situation to the ICC, Putin and Russian leadership will necessarily perceive this as a sign that impunity may reign.

Moreover, although some might argue in favor of Ukrainian national-level prosecutions of Russian perpetrators in lieu of the

236. See, e.g., Masha Gessen, *The Prosecution of Russian War Crimes in Ukraine*, NEW YORKER (Aug. 1, 2022), <https://www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine> [https://perma.cc/JMD6-T654] (describing Russian atrocities through the lens of Ukrainian civilian lives that were upended by the war). Of course, as the war wages on, the atrocities continue to mount as does the toll on innocent victims.

237. See Marc Champion, *Why the Minsk Accords Failed to Bring Ukraine Peace*, BLOOMBERG (Feb. 24, 2022, 6:05 AM), <https://www.bloomberg.com/news/articles/2022-02-18/why-minsk-accords-are-murky-path-for-ukraine-peace-quicktake> [https://perma.cc/5RXT-N5VB] (explaining the West's role in negotiating the Minsk agreements).

238. Victor Rud, *No, Russia's War Against Ukraine Is Not "Complicated"*, KYIV POST (May 25, 2022, 11:48 AM), <https://www.kyivpost.com/article/opinion/op-ed/no-russias-war-against-ukraine-is-not-complicated.html> [https://perma.cc/B32P-KEVA] (arguing that the West's focus on a negotiated solution to Russia's 2014 annexation of Crimea and invasion of Ukraine set the stage for Putin's "expanded thrust into Ukraine").

239. See *id.*

240. See *supra* notes 169–174 and accompanying discussion.

ICC,²⁴¹ this Article argues that the ICC also has an important role to play in signaling the international community's commitment to ending impunity for atrocity crimes. While the ICC itself functions on the premise of complementarity, national-level prosecutions are often difficult to implement. States at times lack judicial capacity, or do not have adequate legislative frameworks; they may also be plagued by insufficient resources necessary to carry out complex atrocity crimes prosecution; some states also face corruption issues.²⁴² Ukrainian courts clearly should continue to prosecute offenders.²⁴³ But Ukrainian courts likely do not have the capacity—nor the necessarily international laws—to prosecute every high-level leader for the large number of crimes that have allegedly been committed in Ukraine to date. For these reasons, the ICC maintains a crucial role in prosecuting perpetrators of such heinous crimes in Ukraine, as well as in other situations where the Court has launched, and will launch, investigations and prosecutions.

As discussed above, states have signaled that they are overwhelmingly committed to providing the ICC with the financial and other resources it needs to bring perpetrators of atrocities committed in Ukraine to justice.²⁴⁴ Maintaining this commitment to accountability is necessarily difficult when states have other concerns that may be of great importance to their domestic audiences. For example, some states are facing rising gas prices and the prospects of energy supply and grain shortages because of Russia's actions.²⁴⁵ This Article, however, urges

241. See, e.g., Mark Kersten, *It's in Ukraine's Interest to Prosecute its Own Alleged Crimes*, AL JAZEERA (June 10, 2022), <https://www.aljazeera.com/opinions/2022/6/10/its-in-kyivs-interest-to-investigate-war-crimes-by-ukrainians> [<https://perma.cc/W8NK-AFBS>] (noting that Ukrainian national-level prosecutions could have effects on future peace negotiations, post-war reconciliation, citizen confidence in the government and the judiciary, Ukraine's post-conflict rebuilding efforts, and Kyiv's mission to join the European Union).

242. *Id.* (noting that the Ukraine Prosecutor General Venediktova has admitted that corruption severely undermines trust in the Ukraine justice system). For a more general discussion of issues associated with domestic-level prosecutions in the context of the ICC complementarity regime, see generally Yahli Shereshevsky, *The Unintended Negative Effect of Positive Complementarity*, 18 J. INT'L CRIM. J. 1017 (2020).

243. Kersten, *supra* note 241.

244. See *supra* Section II.B.

245. See Alvaro Vargas Llosa, *Sanctions Are Hurting the West More Than Russia*, INDEP. INST. (July 25, 2022), <https://www.independent.org/news/article.asp?id=14238> [<https://perma.cc/8QG3-M4SQ>] (noting that Europe has been struggling to meet its energy needs, that the United States had to ask Saudi Arabia for more crude oil to help

states to stay the course, given the importance of the ICC's role as a global accountability leader. Only with commitment from states can the ICC demonstrate to Putin and his forces that those who commit atrocities will face justice.

5. *State Support for the ICC: Pathway to Increased Legitimacy*

The Ukraine crisis should serve as a catalyst for states to provide broad, long-term support to the ICC, the only permanent global accountability mechanism. With such state support, the ICC could continue to operate as an efficient and effective institution: it could pursue well-selected situations and cases with a focus of bringing those most responsible for the most brutal crimes to justice. The Ukraine crisis presents an opportunity for the Court to enhance its own legitimacy, as well as for states to support the Court.

Of course, the ICC's legitimacy will suffer if the Court fails to convict any perpetrators of atrocities committed in Ukraine despite the unprecedented support it is presently receiving. Such a result may suggest that it is not funding and cooperation, but rather some fundamental flaw in the institution's functioning, that is causing it to fail to fulfill its mandate. This Article, however, suggests that success is likely if one takes a realistic view of what the ICC can accomplish in even the best of circumstances given its mandate and its institutional constraints. First, states must continue to support the Court financially and otherwise and not back off nor waver for various reasons—such as the need to focus on domestic concerns such as energy shortages. Second, states should not set unrealistic expectations about what the ICC can accomplish—especially without state support. States may wish to see Putin prosecuted by the Court. But only states can deliver Putin or other high-ranking officials to The Hague. Along those same lines, states must recognize that obtaining evidence against some high-ranking officials may be exceedingly difficult if the necessary evidence is in Russia, a state which will not cooperate with the Court and where the Court may not enter to gather evidence.²⁴⁶ Nor is the ICC situated in even the best of circumstances to prosecute hundreds of perpetrators. It has always been conceived as a Court that would prosecute a small number of perpetrators and complement national accountability. Further, as a permanent court, the ICC has other

bring down gas prices, and that economic sanctions imposed against Russia seem to be taking a greater toll on the rest of the world than Russia itself).

246. See *supra* notes 39–45 and accompanying text.

situations where it must also mount investigations and prosecutions. In other words, some of the prerequisites for “success” in some cases against some perpetrators may well be out of the ICC’s control. States must be willing to be accept that and not brand the Court as a failure should it not deliver something which may be out of its grasp.

Realistically, one should expect that with support, the ICC will eventually be able to secure the arrest and transfer of at least some high-level perpetrators of the alleged crimes being committed in Ukraine. That should be enough for the ICC to demonstrate its legitimacy.

CONCLUSION

The ICC is facing a legitimacy crisis driven in part by its own member states who complain that the Court has not delivered enough convictions. This Article suggests that states consider that the lack of convictions is not attributable only to the OTP. As is true of any institution, the ICC makes mistakes and can operate more efficiently and effectively. But the OTP also needs financial support and cooperation from states to fulfill its mission. It cannot deliver justice in an ever-expanding number of cases without sufficient resources and staffing, and without support from the community that created it.

That states are presently providing money and other resources to the Court following the Russian invasion is a welcome development—and a practice that should be continued and, even, increased. Although one cannot claim with certainty that the result will be justice for victims, the evidence outlined above does indicate that if states fail to support the ICC, justice may be delayed or denied, as it has been in some of the other ICC situations.²⁴⁷ States created the Court to end impunity for mass atrocities and to provide justice to victims; it was not created to be mere decoration.²⁴⁸ Ending impunity and providing justice requires money, though significantly less than states spend on

247. See, e.g., *supra* Section II.A.2.

248. Former ICC President, Chile Eboe-Osuji, put it this way in his comments to the ASP, while urging support for the Court:

You established this Court 20 years ago and decided to locate it in The Hague. You housed it in a magnificent edifice visibly designed of steel, glass and green wall creepers – not too far from the beautiful flower Gardens of Keukenhof. But, you were fully aware that you did not set out to build a greenhouse, where successive Judges and Prosecutors and their Registrars would grow pretty tulips to be oohed and cooed over in agreeable diplomatic ambience.

Judge Chile Eboe-Osuji, *supra* note 1, at 4.

their militaries—which they also use to address atrocities.²⁴⁹ In the case of domestic mass atrocities, and where victims are nationals, states are apparently willing to do whatever it takes.²⁵⁰ The same attitude should prevail when it comes to supporting the ICC’s investigations.

Although the Russian invasion of Ukraine is a devastating development, the positive development is that states have responded to it by providing the Court with financial and other resources that they have been less than willing to provide in the past. With this support, and continued support, states may find that the ICC can do its work and can deliver justice to victims. The outcome for the ICC is that states and all interested stakeholders may begin to perceive the Court as an institution corresponding to its founding mandate to end impunity for the most heinous international crimes. Conversely, if states fail to support the Court, these important outcomes for victims and for the Court may be lost.

249. *Id.* at 9 (noting that global “military spending is roughly ten thousand times larger than the budget of the ICC”). As to military spending, as of August 2022, the U.S. alone spent approximately \$9.8 billion on ammunition, weapons, and equipment to aid Ukraine in fighting against the Russian aggression. *See* Press Release, U.S. Dep’t of State, \$1 Billion in New U.S. Military Assistance for Ukraine (Aug. 8, 2022), <https://www.state.gov/1-billion-in-new-u-s-military-assistance-for-ukraine> [<https://perma.cc/2X7S-N62A>]. As of May 8, 2022, the G7 “have provided and pledged additional support [to Ukraine] since the start of the war exceeding USD 24 billion for 2022 and beyond, in both financial and material means.” *G7 Leaders’ Statement*, WHITE HOUSE (May 8, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/08/g7-leaders-statement-2> [<https://perma.cc/C8EV-6D23>].

250. *See supra* text accompanying notes 58–62.