

**THE ICC PLAYBOOK: STRATEGIES STATES USE TO
INFLUENCE THE INTERNATIONAL CRIMINAL
COURT**

Christopher Moxley

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THE ICC PLAYBOOK: STRATEGIES STATES USE TO INFLUENCE THE INTERNATIONAL CRIMINAL COURT

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Abstract

The International Criminal Court (ICC) has generated substantial controversy in recent years. Many states have welcomed its investigations, either assisting prosecutions at The Hague or working with the ICC to strengthen domestic accountability efforts. However, several powerful states have adopted a hostile posture towards the ICC over its involvement in geopolitically charged conflicts. The strategies states use to influence the Court will profoundly impact the future of the ICC and the pursuit of global criminal justice. This Article explores the history of interactions between states and the ICC across the first two decades of the Court's existence. Guiding the analysis, this Article classifies state engagement strategies into five categories: self-referral, partnership, litigation, extrajudicial engagement, and repudiation. By analyzing interactions between states and the ICC under this framework, this Article reveals advantages and disadvantages of each form of engagement and identifies the circumstances in which states prefer various sets of strategies.

I. Introduction

The International Criminal Court (ICC) has reached a critical juncture.¹ The push for investigations in Afghanistan and Palestine drew targeted sanctions from the United States (U.S.) under the Trump

[†] J.D., Stanford Law School, 2022. The ideas expressed herein are solely my own and not necessarily the views of the U.S. government. I am deeply indebted to Professor Beth Van Schaack and Professor Todd Buchwald for their invaluable assistance throughout the research process. Thank you also to Justin M. Lange and the rest of the editors at the *Syracuse Journal of International Law and Commerce* for their diligent work and feedback.

¹ This Article is current as of December 2021. Subsequent developments with respect to the International Criminal Court or global politics are not addressed.

administration.² Investigation or calls for investigation in Ukraine,³ Georgia,⁴ Syria,⁵ and Xinjiang⁶ implicated conduct by major powers, including Russia and China. Meanwhile, the United Kingdom (U.K.), one of the most influential supporters of the ICC, criticized the Court's governance and case strategy amid the OTP's now-resolved examination of the U.K.'s conduct in Iraq.⁷ At the same time, the current moment presents an opportunity to reset several significant relationships, with a new prosecutor taking over the OTP, the Biden administration at the helm in the U.S., a U.K. government no longer facing potential investigation,⁸ and the Assembly of States Parties (ASP) considering the implementation of structural reform.⁹ As governments assess their posture towards the ICC at this transitional moment, it is useful to reflect on lessons learned from states—both parties and non-parties to the ICC's governing Rome

² Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020); see Alex Ward, *Why the Trump administration is sanctioning a top international court*, VOX (June 12, 2020), available at <https://www.vox.com/2020/6/12/21287798/trump-international-criminal-court-sanctions-explained> (last visited Oct. 24, 2021).

³ *Report on Preliminary Examination Activities (2020)* 68, ICC-OTP (Dec. 14, 2020) [hereinafter PE Report 2020], available at <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (last visited Oct. 30, 2021).

⁴ *Report on Preliminary Examination Activities (2015)* 52–60, ICC-OTP (Nov. 12, 2015) [hereinafter PE Report 2015], available at <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> (last visited Oct. 29, 2021).

⁵ *Russia and China Veto UN Move to Refer Syria to ICC*, BBC (May 22, 2014), available at <https://www.bbc.com/news/world-middle-east-27514256>.

⁶ PE Report 2020, *supra* note 3, at 18–20; Javier C. Hernández, *I.C.C. Won't Investigate China's Detention of Muslims*, N.Y. TIMES, Dec. 15, 2020, available at <https://www.nytimes.com/2020/12/15/world/asia/icc-china-ughur-muslim.html>.

⁷ Andrew Murdoch, *UK statement to ICC Assembly of States Parties 17th session* (Dec. 5, 2018), <https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session#:~:text=The%20United%20Kingdom%20is%20determined,Syria%2C%20Iraq%2C%20and%20Burma;Statement%20of%20the%20Prosecutor,Fatou%20Bensouda,on%20the%20conclusion%20of%20the%20preliminary%20examination%20of%20the%20situation%20in%20Iraq/United%20Kingdom,ICC-OTP> (Dec. 9, 2020), available at <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk> (last visited Oct. 30, 2021).

⁸ *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom*, ICC-OTP (Dec. 9, 2020), available at <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk> (last visited Oct. 30, 2021).

⁹ See GROUP OF INDEPENDENT EXPERTS, INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM: FINAL REPORT (Sept. 30, 2020).

Statute¹⁰—engaging with the Court over the first two decades of its operation.

Motivations underlying states' strategies for dealing with the ICC can cut in opposing directions. In tension with the ICC is a state sovereignty interest in resolving issues of justice in-house.¹¹ To turn a domestic investigation over to an international institution is to relinquish some control over the parameters and outcome of that investigation. Political motivations weigh for and against working with the ICC. On the one hand, the OTP can support a government by bringing greater investigative resources to bear upon its enemies in a complicated justice situation,¹² and leaders may view the OTP as a convenient scapegoat if the investigation goes in an unpopular direction. On the other hand, collaboration with the ICC may invite political attack on a state's leadership for ceding sovereignty to international institutions.¹³ Diplomatic interests vary as well, as some states may seek to stay in the ICC's good graces, either to alleviate pressure from allies, civil society, and members of the ASP, or to use it as a tool to hold rival states accountable for human rights abuses.¹⁴ Other states may choose to keep the ICC at arms-length so as not to legitimize its interventions into complex conflicts.¹⁵ Lastly, though convenient to rely on a hard-boiled view of state decision-making, many policymakers are motivated by a genuine interest in the principles of justice espoused by the Rome Statute.¹⁶

In pursuit of these varied interests, states deploy a range of actions towards the ICC, sometimes in contradictory ways. This Article surveys the strategies that states use to influence actors within the ICC, finds that states often choose to constructively engage with the Court and OTP

¹⁰ Rome Statute of the International Criminal Court [hereinafter Rome Statute], *opened for signature* July 17, 1998, 2187 U.N.T.S. 3.

¹¹ See, e.g., *Statement on Behalf of the United States of America* (Dec. 8, 2017), available at <http://www.justsecurity.org/wp-content/uploads/2017/12/united-states-statement-international-criminal-court-icc-afghanistan-december-2017.pdf> (“[W]e have not consented to the ICC’s evaluation of our accountability efforts.”).

¹² See *infra* Part III.A.

¹³ See, e.g., Samuel Osborne, *Theresa May speech: Tory conference erupts in applause as PM attacks ‘activist left wing human rights lawyers’*, INDEP. (Oct. 5, 2016), available at <https://www.independent.co.uk/news/uk/politics/theresa-may-tory-conference-speech-applause-attacks-activist-left-wing-human-rights-lawyers-a7346216.html> (decrying the Iraq Historic Allegations Team’s investigation into conduct by U.K. soldiers in Iraq); see also *infra* Part IV.B.

¹⁴ See *infra* Parts III.B, IV.A.

¹⁵ See *infra* Part VII.

¹⁶ See Rome Statute, *supra* note 10, at pmb1.

whether or not they share the ICC's objectives, and seeks to identify the advantages and disadvantages of various forms of engagement. Lastly, this Article explores a trend in which states seeking to undermine an ICC preliminary examination or investigation have chosen to do so through forms of constructive engagement, as opposed to total repudiation.

The actions states take to exert influence over the ICC can be understood on a continuum from cooperation to repudiation. There are five categories of strategies along this continuum: self-referral, partnership, litigation, extrajudicial engagement, and repudiation. On the most cooperative end, states such as Uganda and Ukraine have self-referred their conflicts to the Prosecutor prior to any ICC involvement, granting the OTP the authority to investigate the situation.¹⁷ Meanwhile, states pursuing a partnership approach, including Colombia and the U.K., have worked closely with the OTP after it opened a preliminary examination to develop domestic accountability mechanisms that satisfy the Court's standards of justice.¹⁸ Primarily after an investigation opens, a set of litigation tools are available under the Rome Statute to states choosing to contest proceedings. States may file motions through the Court's formal mechanisms, perhaps even allowing defendants to stand trial as Kenya did, or use proxies to litigate key issues on their behalf, as in the cases of Israel and Sudan.¹⁹ Extrajudicial engagement takes various forms at each stage of ICC involvement, from working behind the scenes with the OTP to steer a preliminary examination in a favorable direction to using diplomatic tools to hem in an investigation.²⁰ Indeed, some states, such as the U.S. under the Obama administration, have relied almost entirely on extrajudicial tools in lieu of more public forms of engagement.²¹ Lastly, a handful of states such as Russia, Sudan, and the U.S. under the Trump administration have responded to ICC scrutiny with total repudiation, denouncing and disrupting the Court's inquiries.²² The purposes of repudiation strategies are to strongarm the OTP away from investigation and cripple the OTP's ability to prosecute by closing off sources of evidence.²³

It is important to note that states may not discretely operate within one bucket of strategies along the continuum. Instead, states often deploy a package of strategies, potentially in contradictory ways, such as

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part IV.

¹⁹ See *infra* Part V.

²⁰ See *infra* Part VI.

²¹ *Id.*

²² See *infra* Part VII.

²³ *Id.*

publicly rejecting the Court's authority while privately sharing information with the OTP. Additionally, a state's posture towards the ICC may shift over time, responding to priorities of new leadership or procedural progression of a situation through the ICC system. This Article documents the strategies states use to influence the ICC across the continuum and analyzes the efficacy of different forms of engagement. Actions by all states implicated by both preliminary examinations and investigations informed these findings. The Article focuses on instances over the first twenty years of the ICC's operation that best demonstrate the scope, advantages, and disadvantages of various types of engagement.

II. Background: International Criminal Court Structure and Functions

In operation since 2002, the ICC was established by the Rome Statute to investigate and try individuals charged with grave crimes under international law: genocide, war crimes, crimes against humanity, and the crime of aggression.²⁴ States become parties to the ICC by ratifying the Rome Statute; in doing so, they obtain membership and a vote in the Assembly of States Parties (ASP), the Court's governing body.²⁵ The ASP convenes annually to handle management, oversight, and legislation of the ICC.²⁶ Meanwhile, four organizational branches comprise the ICC:

²⁴ The crime of aggression came within the Court's jurisdiction in January 2017 after the 30th state, Palestine, ratified the amendments setting forth the definition and scope of the crime. See Rome Statute, *supra* note 10, at arts. 5–8; Press Release, ICC, *State of Palestine becomes the thirtieth state to ratify the Kampala amendments on the crime of aggression* (June 28, 2016), available at <https://www.icc-cpi.int/test-new-master/Pages/pr-new.aspx?name=pr1225> (last visited Nov. 1, 2021).

²⁵ Currently, 123 states have ratified the Rome Statute. The U.S., Russia, and China are not ICC parties. See Rome Statute, *supra* note 10, at art. 112; ICC-ASP, *The States Parties to the Rome Statute*, available at https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Nov. 1, 2021).

²⁶ In furtherance of its governance of the ICC, the ASP convenes Working Groups to meet with Court officials and civil society and also recently commissioned an Independent Expert Review, which announced recommendations to improve the ICC system in September 2020. For more on the ASP system, see Coalition for the International Criminal Court, *Assembly of States Parties*, available at [https://www.coalitionfortheicc.org/assembly-states-parties#:~:text=The%20Bureau%20has%20two%20working,Hague%20Working%20Group%20\(HWG\).&text=The%20ASP%20has%20a%20permanent,is%20located%20in%20The%20Hague](https://www.coalitionfortheicc.org/assembly-states-parties#:~:text=The%20Bureau%20has%20two%20working,Hague%20Working%20Group%20(HWG).&text=The%20ASP%20has%20a%20permanent,is%20located%20in%20The%20Hague) (last visited Nov. 1, 2021); see also Douglas Guilfoyle, *The International Criminal Court Independent Expert Review: questions of*

the Presidency, the Judicial Chambers, the Office of the Prosecutor (OTP), and the Registry.²⁷ The ICC's component branches are entitled to independence from the ASP in the domains of prosecutorial and judicial decision-making, but the ASP exerts significant control over these bodies by, for example, electing the Prosecutor and managing the Court's budget.²⁸ The Chambers and OTP are the focus of the analysis in this paper, as the Presidency and Registry primarily carry out administrative duties.

A situation can only come before the Court through one of three methods: referral by a state party, referral by the Security Council, or initiation by the Prosecutor on the basis of *proprio motu* powers.²⁹ States parties and the Prosecutor can only initiate proceedings involving crimes committed on the territory of a state party or by nationals of a state party, though non-party states can choose to accept the Court's jurisdiction over a particular situation on an ad hoc basis through Article 12(3).³⁰ The Security Council can refer any situation to the Court via Chapter VII resolution, regardless of the party status of those involved.³¹

There are two distinct phases of ICC involvement: the preliminary examination and the investigation. The OTP uses the preliminary examination phase to determine "whether a situation meets the legal criteria established by the Rome Statute" to warrant an investigation.³² The relevant factors the Prosecutor must consider are set forth in Article 53(1): jurisdiction, admissibility, and the interests of justice.³³ If the requirements are met, the Prosecutor must move forward with an

accountability and culture, EJIL:TALK! (Oct. 7, 2020), available at <https://www.ejiltalk.org/the-international-criminal-court-independent-expert-review-questions-of-accountability-and-culture/#:~:text=The%20Independent%20Expert%20Review%20of,reported%20on%2030%20September%202020.&text=Nonetheless%2C%20it%20appears%20a%20scrupulously,Court's%20operations%20and%20internal%20problems> (last visited Nov. 1, 2021); GROUP OF INDEPENDENT EXPERTS, *supra* note 9.

²⁷ Rome Statute, *supra* note 10, at art. 34.

²⁸ Discomfort with the ICC's dual existence as an independent judicial entity and as an international organization subject to ASP control figured prominently in the recent Independent Expert Review recommendations. See Guilfoyle, *supra* note 26.

²⁹ Rome Statute, *supra* note 10, at art. 13; BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 191 (4th ed. 2020).

³⁰ Rome Statute, *supra* note 10, at art. 12.

³¹ *Id.* at art. 13.

³² *Preliminary Examinations*, ICC (n.d.), available at <https://www.icc-cpi.int/pages/pe.aspx> (last visited Nov. 1, 2021).

³³ Rome Statute, *supra* note 10, at art. 53(1).

investigation (pending judicial authorization if the investigation is initiated using the Prosecutor's *proprio motu* powers).³⁴ At the investigation stage, the Prosecutor is empowered to conduct a comprehensive inquiry into the relevant allegations for purposes of bringing cases to trial against individual defendants or groups of defendants.³⁵

As an additional check on the Prosecutor's discretion, the Rome Statute allows states and individuals to formally contest the jurisdiction or admissibility of a case. Under Article 19, either accused individuals or states which have jurisdiction over a situation can submit a challenge at any point prior to the commencement of trial.³⁶ The case or cases challenged must satisfy temporal, subject matter, and nationality/territorial jurisdiction.³⁷ The question of admissibility involves an examination of whether the state is willing and able to prosecute the case or cases in question, and whether the case or cases are of sufficient gravity.³⁸

The following analysis digs deeper into Article 19 and other methods by which states contest proceedings. It is sufficient at this stage to bear in mind the distinctions between the OTP conducting a preliminary examination, opening an investigation, and commencing individual trials, as the phase of ICC involvement affects the strategies states use to influence that involvement.

III. Self-Referral

As described above, parties to the Rome Statute may communicate to the Prosecutor an intent to refer a situation concerning their own territory to the ICC, and non-party states may refer situations concerning their territory to the ICC by submitting an Article 12(3) declaration accepting the Court's jurisdiction.³⁹ States deploy these self-referral strategies when they identify an opportunity to benefit from the OTP's

³⁴ *Id.*

³⁵ VAN SCHAACK & SLYE, *supra* note 29, at 190.

³⁶ States may submit this challenge after the Prosecutor has requested an investigation or after individual charges have been filed, at which point individuals may also submit a challenge. Art. 19(5) requires the challenge to be submitted "at the earliest opportunity." Barring exceptional circumstances, only one challenge may be filed, and states and individuals lose the right to challenge admissibility once the trial begins. *See* Rome Statute, *supra* note 10, at art. 19.

³⁷ *See* VAN SCHAACK & SLYE, *supra* note 29, at 195–96.

³⁸ Rome Statute, *supra* note 10, at art. 17.

³⁹ Rome Statute, *supra* note 10, at arts. 12–14.

power as a prosecutorial mechanism and the Court's status as an arbiter of international disputes.

A. STATES USE SELF-REFERRAL TO LEVERAGE THE COURT'S RESOURCES AND CONTROL OPTICS

The first instance of self-referral in the ICC's history arose in December 2003 when the government of Uganda referred the "situation concerning the Lord's Resistance Army (LRA)" to the ICC.⁴⁰ Uganda struggled unsuccessfully to defeat the LRA for nearly two decades and viewed self-referral as a means "to intimidate these thugs [the LRA], to show that they were sought by many more" by bringing international resources to bear on the issue.⁴¹ Ugandan President Yoweri Museveni explained that the "involvement of the ICC in hunting Kony is very important, mainly because it enables us to deal with Khartoum. Khartoum is fully aware of the consequences of dealing with somebody under the ICC's indictment . . . we need the ICC's assistance to get the Sudanese government to cooperate with us."⁴² Additionally, the government was facing scrutiny into the conduct of its Ugandan government forces (the UPDF) in the fight against the LRA, whose actions had triggered diplomatic conflict with the Democratic Republic of the Congo (DRC).⁴³ Thus, the Ugandan government used the referral to portray itself as aligned in pursuing justice against the LRA. Uganda also expected that the ICC would only investigate conduct by the LRA, maintaining that the Prosecutor need not consider UPDF actions because

⁴⁰ Press Release, ICC-OTP, *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC*, ICC-20040129-44 (Jan. 29, 2004) available at https://www.icc-cpi.int/Pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+_lra_+to+the+icc&ln=en (last visited Oct. 31, 2021).

⁴¹ Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. OF INT'L L. 941, 949 (2011) (quoting from interview with a government minister, Kampala Oct. 2008) (internal quotation marks omitted).

⁴² IRIN, *Interview with President Yoweri Museveni*, NEW HUMANITARIAN (June 9, 2005), available at <https://www.thenewhumanitarian.org/report/54853/uganda-interview-president-yoweri-museveni> (last visited Oct. 31, 2021).

⁴³ The DRC brought claims before the International Court of Justice that Uganda violated international law through the actions of the UPDF in eastern DRC. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶¶ 1–2, (Dec. 19).

“[i]f there are atrocities committed [by Ugandan government forces], we punish them ourselves.”⁴⁴

The strategy to weaponize the ICC against the LRA while heading off scrutiny into the UPDF has largely succeeded. The OTP has appeared partial towards the Ugandan government dating back to the opening announcement of the referral, a 2004 press conference which Prosecutor Moreno-Ocampo conducted jointly with President Museveni.⁴⁵ In 2005, Prosecutor Moreno-Ocampo announced the issuance of arrest warrants against five LRA leaders, including Joseph Kony, while declining to issue warrants against any members of the Ugandan government, because their alleged crimes did not satisfy the gravity requirement.⁴⁶ When asked why he had seemingly given the UPDF a pass for serious allegations of war crimes and crimes against humanity, Moreno-Ocampo reportedly exclaimed “if you want to support the LRA, fine!”⁴⁷ This reflects the extent to which the OTP internalized and projected outwards the perception that scrutinizing conduct by Ugandan government forces meant siding with the LRA. The OTP’s benevolence towards Uganda has largely continued to the present. For instance, though then-Prosecutor Fatou Bensouda reiterated in 2015 that “*all sides . . . would be investigated,*” her office never issued warrants against UPDF actors.⁴⁸ More recently, in her 2020 Preliminary Examinations Report, the Prosecutor announced her finding that the Kasese murders committed by

⁴⁴ IRIN, *supra* note 42; see Nouwen & Werner, *supra* note 41, at 950.

⁴⁵ See Kevin Jon Heller, *Poor ICC Outreach – Uganda Edition*, OPINIOJURIS (Sept. 22, 2015), available at <http://opiniojuris.org/2015/09/22/poor-icc-outreach-uganda-edition/> (last visited Oct. 29, 2021); Mark Kersten, *Why the ICC Won’t Prosecute Museveni*, JUSTICE IN CONFLICT (Mar. 19, 2015), available at <https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/> (last visited Oct. 29, 2021).

⁴⁶ ICC-OTP, *Statement by the Chief Prosecutor on the Uganda Arrest Warrants* (Oct. 14, 2005), available at https://www.icc-cpi.int/NR/rdonlyres/AF169689-AFC9-41B9-8A3E-222F07DA42AD/143834/LMO_20051014_English1.pdf (last visited Oct. 29, 2021).

⁴⁷ Adam Branch, *What the ICC Review Conference Can’t Fix*, AFRICAN ARGUMENTS (Mar. 11, 2010), available at <https://africanarguments.org/2010/03/what-the-icc-review-conference-cant-fix/> (last visited Oct. 30, 2021); see Nouwen & Werner, *supra* note 41, at 952.

⁴⁸ ICC-OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: justice will ultimately be dispensed for LRA Crimes* (Feb. 27, 2015), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-02-2015-ug> (last visited Oct. 30, 2021); see *Situation in Uganda*, available at <https://www.icc-cpi.int/uganda>.

Ugandan security forces in 2016 did not contain all the necessary elements of any of the Rome Statute's core crimes.⁴⁹

B. EVEN NON-PARTY STATES INVITE ICC SCRUTINY TO PROCURE FAVORABLE DETERMINATIONS

In the years since Uganda's self-referral, a handful of states have followed suit with their own self-referrals. Ukraine, as a non-party to the Rome Statute, filed two Article 12(3) declarations accepting ICC jurisdiction.⁵⁰ The first declaration, authorizing ICC scrutiny into conduct from November 2013 to February 2014, was motivated by a change of administration: the Ukrainian parliament ousted President Yanukovich and accepted ICC jurisdiction over crimes committed under his watch.⁵¹ The second declaration, broadly accepting ICC jurisdiction over all crimes committed in Ukraine from February 2014 onwards, sought assistance from the ICC to address war crimes committed by its adversaries in the ongoing conflict against Russia and Russian-backed separatists.⁵² In December 2020, the Prosecutor announced that she would seek authorization to open an investigation in Ukraine.⁵³ While the investigation will take shape over the coming years, Ukraine already began to benefit from the OTP's involvement during the preliminary examination phase. For example, the Prosecutor announced in her 2016 Preliminary Examinations Report that the situation between Russia and Ukraine amounted to an international armed conflict,⁵⁴ bolstering Ukraine's broader international legal strategy at the time to contest Russian intervention.⁵⁵ Ukraine extensively cooperated with the Prosecutor in the leadup to this determination, who noted in the same report that she "received a large volume of information . . . from the

⁴⁹ PE Report 2020, *supra* note 3, at 13.

⁵⁰ See *Preliminary Examination: Ukraine*, ICC (n.d.), available at <https://www.icc-cpi.int/Ukraine> (last visited Oct. 30, 2021).

⁵¹ PE Report 2020, *supra* note 3, at 68–69.

⁵² *Id.*

⁵³ *Id.* at 72.

⁵⁴ *Report on Preliminary Examination Activities (2016)* 35, ICC-OTP (Nov. 14, 2016) [hereinafter PE Report 2016], available at https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (last visited Oct. 30, 2021).

⁵⁵ See, e.g., Beth Van Schaack, *Ukraine v. Russia: Before the International Court of Justice*, JUST SECURITY (Feb. 2, 2017), available at <https://www.justsecurity.org/37167/ukraine-v-russia-international-court-justice/> (last visited Oct. 26, 2021) (describing Ukraine's efforts to press claims against Russia in various international courts).

Ukrainian government” over the course of her inquiry.⁵⁶ The Ugandan and Ukrainian situations demonstrate that self-referral and ad hoc acceptance of ICC jurisdiction offer upside for states parties and non-parties alike hoping to leverage the power of the ICC as both a prosecutorial body and an arbiter of international disputes. There is obviously risk that the OTP ends up focusing on actions by the referring government, but Uganda’s experience suggests this risk may be mitigated by the goodwill and influence that self-referral generates.

Indeed, the use of self-referral to obtain favorable international legal determinations has only grown since Ukraine’s referral. Palestinian leadership lodged an Article 12(3) declaration accepting ICC jurisdiction over its territory in 2015, leading to the contentious finding by the OTP that there is basis to proceed with investigation into alleged crimes committed in Palestine, including those committed by Israeli forces.⁵⁷ The OTP then sought a determination from the Pre-Trial Chamber to clarify the permissible territorial bounds of a potential investigation, forcing the Court to make a decision as to the scope of Palestine’s right to accept the Court’s jurisdiction.⁵⁸ The Court held that, while it could not resolve the broader question of Palestinian statehood, it did have the power to determine that Palestine had acceded to the Rome Statute through proper procedures and therefore the ICC could exercise jurisdiction on Palestinian territory.⁵⁹ This result, conferring legitimacy to Palestine’s efforts to exercise diplomatic autonomy, has set a precedent that others in similar positions in the future could look to as an avenue to bolster their claim to sovereignty.

IV. Partnership

Though the chief purpose of a preliminary examination is to assess whether a situation warrants investigation, the OTP has acknowledged

⁵⁶ PE Report 2016, *supra* note 54, at 40.

⁵⁷ See *Situation in the State of Palestine*, ICC (Jan. 2018), available at <https://www.icc-cpi.int/Palestine> (last visited Oct. 26, 2021).

⁵⁸ *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction*, ICC-OTP (Dec. 20, 2019), available at <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine> (last visited Oct. 26, 2021).

⁵⁹ Press Release, ICC, *ICC Pre-Trial Chamber I issues its decision on the Prosecutor’s request related to territorial jurisdiction over Palestine*, ICC-CPI-202100205-PR1566 (Feb. 5, 2021), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1566> (last visited Oct. 26, 2021).

that “a significant part of the Office’s efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes.”⁶⁰ This latter objective is known as positive complementarity, where the OTP leverages the ICC’s status as a complementary court to support national proceedings and falls back on ICC investigation if domestic efforts falter.⁶¹ The leverage applies in both directions, however, because states use the OTP’s constraints, such as its unwillingness to spread resources thin across too many situations and its preference to not antagonize states parties, to avoid investigation on the basis of positive complementarity.⁶² State decision-makers usually adopt partnership strategies with at least one of two objectives in mind: bolstering the justice process when transitioning out of a conflict, and, more cynically, clearing a minimally satisfactory threshold of ‘justice’ to avoid ICC scrutiny into a particular incident. The partnership route may appeal to states parties confronted with preliminary examinations who want to stay in the good graces of the ASP, as partnership can prevent the OTP from opening a *proprio motu* investigation without drawing the condemnation that refusing to cooperate may bring.

A. STATES USE PARTNERSHIP STRATEGIES TO SUPPORT TRANSITIONAL JUSTICE EFFORTS

States transitioning out of conflict have benefitted from the partnership approach by striking a delicate balance: using the threat of ICC investigation as a bargaining chip in peace negotiations, while relying on progress in peace negotiations to deter actual ICC investigation. In the case of Colombia, the OTP opened a preliminary examination in 2004 into crimes arising out of the conflict between the Colombian government, paramilitary forces, and rebel groups.⁶³

⁶⁰ ICC-OTP, *Policy Paper on Preliminary Examinations*, ICC (Nov. 2013), available at https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf (last visited Oct. 26, 2021).

⁶¹ Fidelma Donlon, *Positive Complementarity in Practice: ICTY Rule 11bis and the Use of the Tribunal’s Evidence in the Srebrenica Trials Before the Bosnian War Crimes Chamber*, in 2 *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 920, 920 (Carsten Stahn & Mohamed M. ElZeidy eds., 2011).

⁶² See *infra* Part IV.B.

⁶³ See *Preliminary Examination: Colombia*, ICC (n.d.), available at <https://www.icc-cpi.int/Colombia> (last visited Oct. 26, 2021).

Colombia, a state party, cooperated from the beginning, but the Prosecutor had to contend with preexisting influences prior to the OTP's first official visit in 2007.⁶⁴ For example, Colombia had already begun working with the Inter-American Commission of Human Rights,⁶⁵ Colombia's 2005 Justice and Peace Law had promised alternative sentencing to rebels who laid down their arms,⁶⁶ and interested parties such as the U.S. played an active role in the resolution of the conflict.⁶⁷ Additionally, some have faulted Prosecutor Moreno-Ocampo for targeting African states while treating Western states leniently.⁶⁸

These factors combined to give Colombia leverage over an OTP that was hoping to avoid being boxed out entirely. The Prosecutor did not advance certain concerns as aggressively as he could have, such as President Uribe's repeated denial of the "false positive" killings, where government forces murdered vulnerable civilians to inflate body count statistics under the guise of attacking rebels.⁶⁹ Nonetheless, during his first visit to Colombia in 2007, the Prosecutor asserted some authority by

⁶⁴ Rene Urueña, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003–2017*, 111 AM. J. INT'L L. 104, 112 (2017).

⁶⁵ *Id.* at 105.

⁶⁶ Juan Forero, *New Colombia Law Grants Concessions to Paramilitaries*, N.Y. TIMES (June 23, 2005), available at <https://www.nytimes.com/2005/06/23/world/americas/new-colombia-law-grants-concessions-to-paramilitaries.html> (last visited Oct. 28, 2021).

⁶⁷ See Patrick Markey, *Colombia extradites 14 militia bosses to U.S.*, REUTERS (May 13, 2008), available at <https://www.reuters.com/article/us-colombia-paramilitaries/colombia-extradites-14-militia-bosses-to-u-s-idUSN1336592420080513> (last visited Oct. 28, 2021) (In 2008, Columbia extradited fourteen paramilitary leaders to the U.S. on drug charges); Urueña, *supra* note 64, at 115.

⁶⁸ Prosecutor Moreno-Ocampo seemed to lay off situations like Colombia where the U.S. was playing an active role. A Bush administration official told the *Wall Street Journal* in 2006 that Moreno-Ocampo "seems to be going to great lengths to avoid stirring up the ire of the United States" in his prosecutorial decisions. Jess Bravin, *U.S. Warms to Hague Tribunal*, WALL ST. J. (June 14, 2006), available at <https://www.wsj.com/articles/SB115024503087679549> (last visited Oct. 30, 2021); Mary Kimani, *Pursuit of justice or Western Plot?*, AFR. RENEWAL (Oct. 2009), available at <https://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot> (last visited Oct. 31, 2021); M. Cherif Bassiouni et. al., *Invited Experts on Africa Question*, ICC FORUM, available at <https://iccforum.com/africa> (last visited Oct. 31, 2021).

⁶⁹ *Pressure Point: The ICC's Impact on National Justice*, HUM. RTS. WATCH (May 3, 2018), available at hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and#_ftn5 (last visited Oct. 30, 2021).

criticizing the use of amnesties and urging the Colombian government to focus on holding accountable paramilitary leadership instead of low-level soldiers.⁷⁰ Thus, partnership and, with it, negotiation in the spirit of positive complementarity began.

Colombia spent the ensuing decade straddling two sets of negotiations: peace settlements with opposing forces and justice commitments with the ICC. President Uribe's successor, Juan Manuel Santos, gave a speech at the 2010 Assembly of States Parties expressing the tension between these two obligations.⁷¹ He touted Colombia's commitment to an "ambitious process of transitional justice" while highlighting that Colombia has endured tremendous suffering, so as to underscore the "desire for peace of millions of Colombians."⁷² For its part, Colombia appointed a former ICC advisor to oversee the development of its Justice and Peace Law framework,⁷³ and it hosted conferences throughout the 2010s between the OTP, Colombian officials, and civil society leaders to discuss topics like complementarity.⁷⁴ These conferences helped foster good will between the OTP and Colombia, and they also sharpened Colombian leaders' understanding of the ICC, strengthening their ability to navigate its bureaucracy.⁷⁵ Meanwhile, the OTP encouraged Colombia to improve on numerous sticking points: lack of investigations into the false positive killings, lack of prosecution for higher-level officials, and allowance of suspended sentencing for those committing the most serious crimes.⁷⁶

⁷⁰ Urueña, *supra* note 64, at 112.

⁷¹ Juan Manuel Santos, *Remarks at the Ninth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court* at 2–3 (Dec. 6, 2010), available at <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/7C8AF684-63F9-42CF-811D-FF8662D31C84/0/CPIFINAL2Ingl%c3%a9s.pdf>.

⁷² *Id.*

⁷³ Edward Fox, *Spanish judge to advise OAS mission in Colombia*, COLOM. REP. (Mar. 25, 2011), available at <https://colombiareports.com/spanish-judge-to-advise-oas-mission-in-colombia/> (last visited Oct. 30, 2021).

⁷⁴ Urueña, *supra* note 64, at 116.

⁷⁵ *Id.*

⁷⁶ See, e.g., PE Report 2016, *supra* note 54, at 56; *Report on Preliminary Examination Activities (2018)* 37, ICC-OTP (Dec. 5, 2018) [hereinafter PE Report 2018], available at <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> (last visited Oct. 30, 2021).

Colombia pursued multiple peace frameworks over the next decade, culminating in the Final Peace Agreement of 2016.⁷⁷ The OTP ultimately compromised on the issue of sentencing to enable this agreement, with Deputy Prosecutor James Stewart declaring in a speech in Bogota that governments have “wide [sentencing] discretion” as long as penal sanctions serve the goals of “public condemnation of the criminal conduct, recognition of the victims’ suffering, and deterrence of further criminal conduct.”⁷⁸ Thus, the ICC has allowed Colombia to proceed with its Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, or JEP) system, which contemplates reduced sentences or house arrest for defendants who participate in truth-telling and provide reparations to victims and the community.⁷⁹ The OTP’s 2020 Preliminary Examination Report concluded that Colombia had satisfactorily responded to the OTP’s priorities, and the OTP shifted towards establishing benchmarks to guide domestic proceedings, rather than pursuing an investigation.⁸⁰ This approval came in spite of complaints by the OTP that Colombia did not fully cooperate, withholding information about its inquiries into the false positive killings.⁸¹

From a state perspective, Colombia’s experience reflects the advantages of partnership with the ICC in the context of a complicated transitional justice process. Though the Colombian government incurred some costs from partnership, Colombia was able to secure compromises from the OTP on issues like alternative sentencing central to peace negotiations.⁸² Colombia tailored aspects of its peace and justice processes to alleviate the Prosecutor’s concerns, inquiring more seriously into false positive killings⁸³ and demonstrating an intention to hold higher

⁷⁷ Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colom.-FARC-EP, Nov. 24, 2016, available at <https://www.peaceagreements.org/viewmasterdocument/1845>.

⁷⁸ James Stewart, *Speech at the ICC Bogota, Colombia Conference: Transitional Justice in Colombia and the Role of the International Criminal Court* at 10 (May 13, 2015), available at <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf>.

⁷⁹ See Luke Moffett, *Between Punishment and Mercy – Alternative Sanctions and the Special Jurisdiction for Peace*, JUST. IN CONFLICT (Apr. 17, 2019), available at <https://justiceinconflict.org/2019/04/17/between-punishment-and-mercy-alternative-sanctions-and-the-special-jurisdiction-for-peace/> (last visited Oct. 30, 2021).

⁸⁰ PE Report 2020, *supra* note 3, at 38–39.

⁸¹ PE Report 2015, *supra* note 4, at 36–39.

⁸² Stewart, *supra* note 78, at 10.

⁸³ PE Report 2020, *supra* note 3, at 33–36.

level military officials accountable for crimes.⁸⁴ As a result of this commitment, the OTP closed its preliminary examination in 2021 without seeking investigation.⁸⁵

B. STATES PURSUE PARTNERSHIP TO STAVE OFF ICC INVESTIGATION INTO SPECIFIC INCIDENTS

Outside of the context of a complicated transitional justice process like Colombia's, states have also utilized partnership strategies to head off ICC investigation into more isolated situations. For example, the U.K. succeeded at deterring ICC investigation through positive complementarity, albeit after a lengthy preliminary examination.⁸⁶ The OTP has twice sought to review detainee abuse by U.K. military personnel in Iraq, opening a preliminary examination from 2005 to 2006 and again from 2014 to 2020.⁸⁷ In the first instance, Prosecutor Moreno-Ocampo praised the U.K.'s investigative efforts and reportedly opted not to press the issue so as not to draw backlash from the U.S. and U.K.⁸⁸ Prosecutor Bensouda reopened the examination in 2014 after receiving new information.⁸⁹ In the interim, the U.K. had established the Iraq Historic Allegations Team (IHAT) to conduct its own investigation, in addition to a handful of independent inquiries into isolated incidents.⁹⁰

⁸⁴ *Id.* at 30–31.

⁸⁵ Press Release, ICC-OTP, *ICC Prosecutor, Mr Karim A.A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the Next Stage in Support of Domestic Efforts to Advance Transitional Justice*, ICC-CPI-20211028-PR1623 (Oct. 28, 2021), available at <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia>.

⁸⁶ *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom*, ICC-OTP (Dec. 9, 2020), available at <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk> (last visited Oct. 30, 2021).

⁸⁷ *Preliminary Examination: Iraq/UK*, ICC (2020), available at <https://www.icc-cpi.int/Iraq>.

⁸⁸ See DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 87–90 (2014).

⁸⁹ *Prosecutor of the International Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq*, ICC-OTP (May 13, 2014), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014> (last visited Oct. 29, 2021).

⁹⁰ *Situation in Iraq/UK: Final Report* 56–85, ICC-OTP (Dec. 9, 2020), available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>.

IHAT processed 3,600 allegations from 2010-2017, producing a single guilty plea.⁹¹ Along the way, the U.K. invested £60 million into IHAT, with members of the government admitting that preventing an ICC investigation was a driving factor of its creation.⁹² The U.K. ultimately dismantled IHAT after a lawyer prominently involved in bringing allegations before the commission was found guilty of professional misconduct for fraudulently soliciting claims implicating 200 servicemen.⁹³ The remaining allegations—1,291 in total—were then transferred to a military police unit,⁹⁴ where they dwindled to a close without a single prosecution.⁹⁵ Nonetheless, on December 9, 2020, the Prosecutor announced that she would end the OTP's preliminary examination without seeking investigation.⁹⁶ She expressed disappointment that IHAT and subsequent investigations did not yield many prosecutions but explained that she could not sufficiently substantiate allegations that the U.K. had shielded perpetrators from justice.⁹⁷ Thus, she closed her examination on the basis that the U.K.'s investigation could not be proven to be inactive or disingenuous, setting a low bar.⁹⁸

The experience of the U.K. reflects the reality that the OTP is resource-strapped and feels pressure to narrow its caseload after years of unresolved preliminary examinations. By pursuing a partnership strategy, the U.K. government maintained control over potential accountability efforts. It will be telling to see how the OTP handles partnership attempts in other states with similar prosecutorial records moving forward, as the OTP will be wary of signaling a double standard

⁹¹ PE Report 2018, *supra* note 76, at 51.

⁹² See Thomas Obel Hansen, *Complementarity (in)action in the UK?*, EJIL: TALK! (Dec. 7, 2018), available at <https://www.ejiltalk.org/complementarity-inaction-in-the-uk/> (last visited Oct. 30, 2021).

⁹³ See Peter Walker, *Iraq war claims unit to be shut down, says UK defense secretary*, GUARDIAN (Feb. 10, 2017), available at <https://www.theguardian.com/world/2017/feb/10/iraq-war-claims-unit-to-be-shut-down-says-uk-defence-secretary> (last visited Oct. 30, 2021).

⁹⁴ *Situation in Iraq/UK: Final Report*, *supra* note 90, at 67.

⁹⁵ Press Release, Ben Wallace, Sec'y of State for Def., *Closure of Service Policy Legacy Investigations* (Oct. 18, 2021), available at <https://questions-statements.parliament.uk/written-statements/detail/2021-10-18/hcws323>.

⁹⁶ *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom*, ICC-OTP (Dec. 9, 2020), available at <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk> (last visited Oct. 30, 2021).

⁹⁷ *Id.*

⁹⁸ *Id.*

when dealing with powerful ICC supporters like the U.K. compared with other nations.

C. NEVERTHELESS, PARTNERSHIP ENTAILS SIGNIFICANT COSTS AND MAY BACKFIRE ENTIRELY

Though positive complementarity has allowed Colombia and the U.K. to maintain significant control over their justice processes, partnership is not without its costs, and certain factors affect its likelihood of success. State experiences have revealed two significant downsides: domestic political costs associated with ceding control of a situation to the OTP, and the risk that the approach fails altogether, resulting in ICC investigation. In terms of political costs, while Colombia was able to use its peace negotiations to force the OTP into compromise, the OTP also exerted leverage on Colombia that complicated peace negotiations with FARC leaders, particularly with respect to the issue of alternative sentencing.⁹⁹ In the U.K., conservatives publicly decried the IHAT process as a “witch-hunt.”¹⁰⁰ This sentiment inspired a push for increased legal protections for British armed forces personnel, which could potentially raise greater obstacles to accountability in the future.¹⁰¹

In addition to political costs, there is no guarantee that the approach will deter investigation. The Court will deny admissibility challenges when states conduct domestic inquiries that are insufficiently genuine or robust.¹⁰² Indeed, even states that work hand-in-hand with the Prosecutor to build out domestic processes may fail if they cannot satisfactorily commit to the approach. In 2010, the OTP opened a preliminary examination into the conflict between Boko Haram and Nigerian security forces, among others, and the Prosecutor announced findings of crimes

⁹⁹ See Uruña, *supra* note 64, at 118.

¹⁰⁰ Press Ass'n, *British Government and Army Accused of Covering Up War Crimes*, GUARDIAN (Nov. 17, 2019), available at <https://www.theguardian.com/law/2019/nov/17/british-government-army-accused-covering-up-war-crimes-afghanistan-iraq> (last visited Oct. 31, 2021).

¹⁰¹ See Nadia O'Mara, *U.K. Proposes to Limit Accountability for Violations by Armed Forces*, JUST SECURITY (Jan. 30, 2020), available at <https://www.justsecurity.org/68346/u-k-proposes-to-limit-accountability-for-violations-by-armed-forces/> (last visited Oct. 31, 2021).

¹⁰² See, e.g., Prosecutor v. Francis Kirimi Muthuara, Uhuru Muigai Kenyatta and Muhammad Hussein Ali, ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

against humanity committed by Boko Haram in 2013.¹⁰³ Nigeria tried to resolve the situation through a partnership approach, and the OTP noted, “since 2013, the Office has sought to encourage relevant and genuine domestic proceedings.”¹⁰⁴ Nonetheless, Prosecutor Bensouda announced in December 2020 that she would seek investigation in spite of “the priority given by my office in supporting the Nigerian authorities in investigating and prosecuting the crimes domestically,” because the domestic investigations focused on low-level perpetrators and insufficiently held government forces accountable.¹⁰⁵

Comparing the successes of the partnership approach in Colombia and the U.K. to failures in Nigeria and elsewhere, several factors emerge to predict whether partnership is viable to a state facing a preliminary examination. The OTP fully supported Colombia’s efforts because Colombia worked closely with the OTP to provide information on domestic proceedings and tailor these proceedings to address areas of concern.¹⁰⁶ Additionally, Colombian efforts to resolve its conflict were supported by civil society and other states, pressuring the OTP to accept them.¹⁰⁷ Meanwhile, the OTP deferred to the U.K., a powerful ally, even though IHAT did not produce notable prosecutions, seemingly because, in part, the U.K. invested a significant amount of money into IHAT, issued a number of statements about investigating systemic crimes, and provided necessary information to the OTP.¹⁰⁸ Lastly, the OTP has sought investigations in states such as Nigeria where the governments did not seem to have the political will or meaningful investigations necessary to prosecute the crimes domestically.

Though no two cases are the same, it seems the Prosecutor will be more deferential to domestic investigations where countries communicate transparently with the OTP, invest significant resources into investigations, ostensibly take a good faith approach to hold high-level actors accountable, are influential parties to the Rome Statute, or are undergoing a complex transition out of conflict that has the support

¹⁰³ See *Situation in Nigeria: Article 5 Report*, ¶¶ 4, 128, ICC-OTP (Aug. 5, 2013), available at <https://www.icc-cpi.int/Pages/item.aspx?name=NGA-05-08-2013> (last visited Oct. 31, 2021).

¹⁰⁴ PE Report 2020, *supra* note 3, at 66.

¹⁰⁵ See *Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Nigeria*, ICC-OTP (Dec. 11, 2020), available at <https://www.icc-cpi.int/Pages/item.aspx?name=201211-prosecutor-statement> (last visited Oct. 31, 2021).

¹⁰⁶ See *supra* Part IV.A.

¹⁰⁷ *Id.*

¹⁰⁸ See *supra* Part IV.B.

of domestic civil society and the international community. On the other hand, the OTP will push for an ICC investigation when the national proceedings only target low-level or rival perpetrators, lack transparency and independence, seem to have been established to shield people from accountability, or when the situation was referred to the OTP by Security Council resolution. In short, partnership requires substantial commitment by states to ward off the ICC, though states may still use partnership as a delay tactic even if it fails to prevent investigation.

V. Litigation

Even when their objectives lie in tension with the Prosecutor's, states have participated in litigation to try to exploit weaknesses in the OTP as a prosecutorial mechanism. As described, Article 19 offers states the opportunity to make jurisdictional and admissibility challenges.¹⁰⁹ Other motions states and individuals make include requests for more time,¹¹⁰ requests for certain trial accommodations,¹¹¹ evidentiary challenges,¹¹² and appeals on the final decision or other decisions throughout the trial,¹¹³ including interlocutory appeals.¹¹⁴ These tools are primarily available to states once a situation reaches the investigation phase, though rare circumstances might give rise to litigation prior to the opening of an investigation.¹¹⁵ States have contested investigations through litigation by challenging admissibility prior to the commencement of trials, challenging cases against individual defendants, and using proxies to litigate on their behalf.¹¹⁶

¹⁰⁹ Rome Statute, *supra* note 10, at art. 19; *see supra* Part II.

¹¹⁰ ICC, *Rules of Procedure and Evidence*, ICC-ASP/1/3, Rule 101.

¹¹¹ *Id.* at Rule 134 *quater*.

¹¹² *Id.* at Rules 63–64.

¹¹³ Rome State, *supra* note 10, at arts. 81–82.

¹¹⁴ *Id.* art. 82; Håkan Friman, *Interlocutory Appeals in the Early Practice of the International Criminal Court*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 553, 554–55 (Carston Stahn & Göran Sluiter eds., 2009).

¹¹⁵ *See, e.g.*, PE Report 2020, *supra* note 3, at 57–58 (requesting a ruling to resolve which territory fell within the ICC's jurisdiction prior to the opening of an investigation).

¹¹⁶ *See* ICC, *Rules of Procedure and Evidence*, ICC-ASP/1/3, Rule 101; *infra* Part V.C.

A. STATES CHALLENGE ADMISSIBILITY TO BAR ICC INVOLVEMENT AND DELAY INVESTIGATIONS

The simplest benefit of challenging admissibility is the possibility of rendering a particular case or entire situation inadmissible before the Court. In June 2011, the ICC issued arrest warrants against Libyan head of state Muammar Gaddafi, his son Saif Gaddafi, and brother-in-law Abdullah al-Senussi.¹¹⁷ Soon after, rebel forces killed Muammar Gaddafi and formed a new government, which then filed an Article 19(2) application challenging the admissibility of both the Saif Gaddafi and Abdullah al-Senussi cases, preferring to deal with the defendants domestically.¹¹⁸ With respect to al-Senussi, the Court sided with Libya, finding that the Libyan government was satisfactorily investigating al-Senussi for the same conduct and rejecting an appeal by al-Senussi himself to keep the case in the ICC.¹¹⁹ Thus, the Libyan government rendered the al-Senussi proceedings inadmissible through direct litigation.

However, the same challenge failed in the case of Saif Gaddafi. The Rome Statute only allows states to challenge admissibility once, so a losing challenge sacrifices the opportunity to contest admissibility moving forward.¹²⁰ Still, states may be willing to take this risk because the ICC's institutional weaknesses reduce the cost of negative judgments. To delay execution of the warrants, Libya had deployed a series of formal challenges: in January 2012, a confidential request under Article 94(1) to postpone their obligation to surrender the defendants;¹²¹ in March 2012, a request for postponement under Article 95 in light of an intention

¹¹⁷ Situation in The Libyan Arab Jamahiriya, ICC-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi, ¶ 4 (June 27, 2011).

¹¹⁸ Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (May 1, 2012).

¹¹⁹ Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Decision on the admissibility of the case against Abdullah Al-Senussi ¶ 311 (Oct. 11, 2013).

¹²⁰ Rome Statute, *supra* note 10, art. 19(4).

¹²¹ Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Report of the Registrar on Libya's Observations Regarding the Arrest of Saif Al-Islam Gaddafi (Jan. 23, 2012); Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Notification and Request by the Government of Libya in Response to "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi" ¶ 1 (Mar. 22, 2012).

to challenge admissibility;¹²² in May 2012, an Article 19(2)(b) admissibility challenge to the Gaddafi and al-Senussi cases,¹²³ denied by the Court with respect to Gaddafi in May 2013;¹²⁴ and in June 2013, an appeal of the Gaddafi denial,¹²⁵ which the Court rejected in May 2014.¹²⁶ Thus, through formal challenges, the Libyan government bought itself several years in which it could credibly refuse to surrender Gaddafi without drawing the ire of the Security Council (and, perhaps, without having to admit it had little control over the terms of Gaddafi's custody).¹²⁷ The Appeals Court's final decision in May 2014 coincided with the escalation of the Second Libyan Civil War,¹²⁸ and Gaddafi was ultimately released from prison as part of an amnesty agreement in defiance of the ICC's orders.¹²⁹

The Libyan government's split experience in the al-Senussi and Gaddafi cases reflects why states may perceive little risk in directly challenging admissibility. The challenge succeeded outright in one

¹²² Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Notification and Request by the Government of Libya in Response to "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi" ¶ 1 (Mar. 22, 2012).

¹²³ Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute ¶ 1 (May 1, 2012).

¹²⁴ Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi ¶¶ 219-20 (May 31, 2013).

¹²⁵ Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, The Government of Libya's Appeal Against Pre-Trial Chamber I's 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi' (June 7, 2013).

¹²⁶ Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case Against Saif Al-Islam Gaddafi" ¶ 215 (May 21, 2014).

¹²⁷ The Tripoli-based government did not have custody of Gaddafi but nonetheless sentenced him to death over video trial in 2015. *Libya trial: Gaddafi son sentenced to death over war crimes*, BBC (July 28, 2015), available at <https://www.bbc.com/news/world-africa-33688391> (last visited Nov. 2, 2021).

¹²⁸ See *Libya: Final ICC Ruling on Gaddafi*, HUMAN RIGHTS WATCH (May 21, 2014), available at <https://www.hrw.org/news/2014/05/21/libya-final-icc-ruling-gaddafi> (noting that the ICC's rejection of Libya's appeal came amid destabilizing violence spreading from Benghazi to Tripoli).

¹²⁹ Mayesha Alam, *Saif Gaddafi's Release and the Challenge for International Criminal Justice*, JUST SECURITY (June 27, 2017), available at <https://www.justsecurity.org/42598/saif-gaddafis-release-challenge-international-criminal-justice/> (last visited Nov. 18, 2021).

instance, while buying Libya significant time in the other. When the challenge in Saif Gaddafi's case failed, Libya simply ignored its obligation to surrender him. The Court issued findings of noncompliance against Libya to the Security Council,¹³⁰ but amidst such a complex and rapidly evolving conflict, the Security Council declined to assist the OTP's efforts and the Libyan government faced no real consequences for noncompliance.¹³¹ It may be tempting to label Libya's experience as an exception because of the influence of Security Council politics, but it is hardly uncommon for a situation under ICC scrutiny to also be highly politicized within the international community in a way that jeopardizes the Court's enforcement power.¹³²

B. STATES LITIGATE INDIVIDUAL TRIALS TO FORCE THE OTP TO PRODUCE DURABLE CASES

Some states feel a greater obligation to nominally comply with the ICC and allow defendants to appear before the Court. In December 2010, Prosecutor Moreno-Ocampo announced he would seek summonses against the so-called "Ocampo Six," six Kenyan suspects connected to crimes against humanity committed during Kenya's 2007–2008 election crisis.¹³³ Facing pressure from civil society and the international community to address the violence, the Kenyan government formally litigated the cases in the ICC system, while subverting the proceedings through various forms of sabotage.¹³⁴ Kenya delayed the commencement of individual trials by filing an admissibility challenge in 2011, which the

¹³⁰ Prosecutor v. Saif al-Islam Gaddafi, ICC-01/11-01/11, Decision on the Non-Compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council (Dec. 11, 2014).

¹³¹ See BOSCO, *supra* note 88, at 168–172.

¹³² See *infra* Part V.C (analyzing the situations involving Israel and Sudan).

¹³³ A summons functions as a less compulsory alternative to an arrest warrant when the Prosecutor believes a suspect will voluntarily appear in response to allegations and wishes to avoid an unnecessary escalation of hostilities. Issuing summonses in the Kenya cases therefore projected a façade of cooperation over the situation. Press Release, ICC-OTP, *Kenya's post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity*, ICC-OTP-20101215-PR615 (Dec. 15, 2010), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr615> (last visited Nov. 2, 2021).

¹³⁴ See Lawrence Helfer & Anne Showalter, *Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC*, 17 INT'L CRIM. L. REV. 1, (Feb. 19, 2017) (summarizing Kenya's strategy).

Court rejected.¹³⁵ Once individual trials began, the government of Kenya then waged an egregious witness tampering campaign, harassed OTP staff, and used domestic bureaucracy to hamstring the investigations.¹³⁶ The defendants and government continued to file formal motions challenging aspects of the Prosecutor's cases, forcing the Prosecutor to produce the necessary bases for continuing the trials, all the while witnesses disappeared or refused to testify.¹³⁷ The obstructive efforts "had a severe adverse impact" on the Prosecutor's cases,¹³⁸ and all charges against the Ocampo Six were dismissed or withdrawn.¹³⁹

As the Kenya experience demonstrates, states facing pressure to not renege on obligations to the ICC may pair direct litigation with extrajudicial tactics to influence the outcomes of investigations. Litigation allows states to maintain at least a veneer of cooperation and, crucially, forces the Court to process the cases towards resolution. This approach enables states to exploit the weakness of the ICC's safeguards against noncooperation. The Prosecutor pushed back by filing for an Article 87(7) referral to the ASP for noncompliance against the government of Kenya¹⁴⁰ and seeking charges against three additional individuals for obstruction of justice under Article 70 (one surrendered to

¹³⁵ Prosecutor v. Francis Kirimi Muthuara, Uhuru Muigai Kenyatta and Muhammad Hussein Ali, ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

¹³⁶ Prosecutor v. Muthaura and Kenyatta, ICC-01/09-02/11, Public redacted version of "Prosecution Submission Regarding the Government of Kenya's Cooperation" 9–21 (Sept. 19, 2012).

¹³⁷ See, e.g., *Statement on the status of the Government of Kenya's cooperation with the Prosecution's investigations in the Kenyatta case*, ICC-OTP (Dec. 5, 2014), available at <https://www.icc-cpi.int/Pages/item.aspx?name=Stmt-05-12-2014> (last visited Nov. 2, 2021).

¹³⁸ *Id.*

¹³⁹ Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, Case Information Sheet (Mar. 13, 2015) (noting Pre-Trial Chamber declined to confirm charges against Ali, charges against Muthaura were withdrawn in March 2013, and charges against Kenyatta were withdrawn in December 2014); Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Case Information Sheet (Apr. 2016) (noting Pre-Trial Chamber declined to confirm charges against Kosgey, and Trial Chamber terminated charges against Ruto and Sang in April 2016).

¹⁴⁰ Press Release, ICC-OTP, *ICC Trial Chamber V(B) refers Non-Cooperation of the Kenyan Government to the Assembly of States Parties to the Rome Statute* (Sept. 19, 2016), available at <https://www.icc-cpi.int/news/icc-trial-chamber-vb-refers-non-cooperation-kenyan-government-assembly-states-parties-rome>.

ICC custody in November 2020).¹⁴¹ The referral has not led to any serious repercussions.

It is risky to have defendants stand trial, and the OTP is hopefully able to draw from prior experiences to build more durable cases in the future. Nonetheless, the results from the first two decades of ICC litigation are undeniably friendly to defendants. A 2019 report studied the thirty-five arrest warrants issued by the Court and found the following: three led to convictions under the Rome Statute's core crimes (in addition to some convictions for lesser offenses), eight resulted in charges not being confirmed, being withdrawn, or being vacated due to lack of evidence, four ended in acquittal, while most of the remainder have been thwarted by an inability to execute the warrants.¹⁴² Direct litigation has allowed certain states to delay trials for years, disrupt the investigation efforts, and obtain favorable outcomes, while avoiding ramifications for noncompliance.

C. STATES ALSO USE PROXY AND SATELLITE LITIGATION TO CONTEST PROCEEDINGS INDIRECTLY

Though Israel informally cooperated in the early years of the Prosecutor's preliminary examination in Palestine,¹⁴³ the Israeli government opted to not directly litigate the Prosecutor's request for a territorial determination.¹⁴⁴ Instead, the Israeli government mobilized a campaign of proxy litigants: entities submitting amicus briefs on Israel's behalf included seven Rome Statute states parties, numerous academic institutions and associations (some of which had ties to the Israeli and

¹⁴¹ Press Release, ICC-OTP, *Situation in Kenya: Paul Gicheru surrenders for allegedly corruptly influencing ICC witnesses*, ICC-CPI-20201102-PR1540 (Nov. 2, 2020), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1540> (last visited Nov. 1, 2021).

¹⁴² Tjitske Lingsma, *Welcome to the ICC "Facts and Figures"*, JUST. INFO. (May 27, 2019), available at <https://www.justiceinfo.net/en/tribunals/icc/41532-welcome-to-the-icc-facts-and-figures.html> (last visited Nov. 1, 2021).

¹⁴³ See *infra* Part VI.E.

¹⁴⁴ Israel publicly released a memo in response to the territorial determination request. See Press Release, State of Israel Office of the Att'y Gen., *The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine"* (Dec. 20, 2019), available at <https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20%E2%80%9Csituation%20in%20Palestine%E2%80%9D%20-%20AG.pdf> (last visited Nov. 1, 2021).

U.S. governments¹⁴⁵), scholars and former government officials with expertise on international law issues, and a Victims of Palestinian Terror group.¹⁴⁶

It remains unclear how successful the proxy approach can be. Prior to Israel's attempt, Myanmar had used proxies to submit arguments contesting the Court's decision to open an investigation, but the Court held that this was an inappropriate place for amicus submissions and that Myanmar should raise procedural objections in its own name.¹⁴⁷ The Court granted most of the requests to file in Israel's case, however, and seemed to give due weight to their arguments in reaching its decision.¹⁴⁸ Still, the Court ultimately held against Israel while referencing Israel's non-participation reprovingly.¹⁴⁹

A second way to indirectly contest proceedings is to trigger satellite litigation. Former Sudanese President Omar al-Bashir's travel after the Chambers issued an arrest warrant against him forced the OTP to ask the

¹⁴⁵ At least three have been connected to the U.S. or Israeli government: ECLJ (whose Chief Counsel is Trump attorney Jay Sekulow, who has also submitted briefing in the Afghanistan situation), the Israel Law Center/Shurat Hadin (leaks picked up by Palestinian media suggest Shurat Hadin has worked directly with the Mossad), and UKFLI (collaborated with Israel's Ministry of Foreign Affairs on past issues). *Id.* (noting submissions from ECLJ, Shurat Hadin, and UK Lawyers for Israel); *ACLJ'S Jay Sekulow Will Appear Before International Criminal Court This Week*, PRWEB (Dec. 1, 2019), available at https://www.prweb.com/releases/acljs_jay_sekulow_will_appear_before_international_criminal_court_this_week_defending_the_rights_of_u_s_soldiers/prweb16757327.htm (last visited Nov. 1, 2021); Asa Winstanley, *Israeli "law center" Shurat Hadin admits Mossad ties*, ELECTRONIC INTIFADA (Nov. 16, 2017), available at <https://electronicintifada.net/blogs/asa-winstanley/israeli-law-center-shurat-hadin-admits-mossad-ties> (last visited Nov. 1, 2021); Hilary Aked, *What is UK Lawyers for Israel's relationship to the Israeli government?*, MONDOWEISS (Mar. 12, 2019), available at <https://mondoweiss.net/2019/03/lawyers-relationship-government/> (last visited Nov. 1, 2021).

¹⁴⁶ For a list of amicus submissions, see Situation in the State of Palestine, ICC-01/18, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence 2–3 (Feb. 20, 2020).

¹⁴⁷ Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision on requests for leave to submit amicus curiae observations ¶ 16 (Nov. 14, 2019).

¹⁴⁸ See, e.g., Situation in the State of Palestine, ICC-01/18, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' ¶ 57 (Feb. 5, 2021).

¹⁴⁹ *Id.* at ¶¶ 29–30, 112.

Court to refer several states, including Uganda,¹⁵⁰ Djibouti,¹⁵¹ South Africa,¹⁵² and Jordan,¹⁵³ to the Security Council and ASP for declining to execute the warrant.¹⁵⁴ The process of making these noncooperation findings provided the noncompliant states, alongside interested amici, with the opportunity to raise head of state immunity arguments before the Court on al-Bashir's behalf.¹⁵⁵ Though the Court repeatedly struck down the immunity arguments, its inconsistent reasoning sparked debate in the international community and led South Africa to attempt to withdraw from the Court rather than execute arrest warrants that would lead to "regime change."¹⁵⁶ Thus, Sudan's experience reveals the potential for

¹⁵⁰ Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-267, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute 9 (July 11, 2016).

¹⁵¹ Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute 10 (July 11, 2016).

¹⁵² Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-302, 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 53 (July 6, 2017).

¹⁵³ Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-309, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir 21 (Dec. 11, 2017).

¹⁵⁴ See Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL: TALK! (May 6, 2019), available at <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> (last visited Jan. 16, 2022); Dapo Akande, *The Immunity of Heads of State of Nonparties in the Early Years of the ICC*, 112 AM. SOC'Y INT'L L. 172, 172–3 (2018).

¹⁵⁵ Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal 11–14 (May 6, 2019) (noting submissions by Jordan and a large number of amici).

¹⁵⁶ See Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL: TALK! (May 6, 2019), available at <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> (last visited Jan. 16, 2022); Dapo Akande, *The Immunity of Heads of State of Nonparties in the Early Years of the ICC*, 112 AM. SOC'Y INT'L L. 172, 172–3 (2018); *South Africa's decision to leave*

states to politicize and delegitimize aspects of the ICC's involvement through satellite litigation.

VI. Extrajudicial Engagement

Whether or not states adopt any of the above strategies, they may also seek to influence preliminary examinations and investigations by applying extrajudicial leverage. Extrajudicial actions include diplomacy in the ASP system, diplomacy in the Security Council system, interactions with the Court or Prosecutor behind the scenes, and assistance to the OTP in other investigations. Non-party states in particular have relied on these strategies in the preliminary examination phase, sometimes as a precursor to repudiation.¹⁵⁷

A. STATE DIPLOMACY IN THE ASP INFLUENCES THE COURT'S DIRECTION

States exert diplomatic pressure within the ASP system to push for favorable outcomes at both the preliminary examination and investigation stages. For example, shortly after the Prosecutor signaled interest in investigating situations in Afghanistan, Palestine, and Colombia, eleven influential ICC parties, including the U.K., reportedly threatened to curtail the ICC's funding.¹⁵⁸ Over the next few years, while partnering with the Prosecutor's preliminary examination into U.K. conduct in Iraq, the U.K. government urged the OTP to adopt a "closure strategy" towards open-ended examinations and investigations and called on the OTP to accord greater respect to domestic investigations.¹⁵⁹ In December 2020, the OTP controversially shut down its U.K./Iraq inquiry

ICC ruled 'invalid', BBC (Feb. 22, 2017), available at <https://www.bbc.com/news/world-africa-39050408> (last visited Sept. 24, 2021).

¹⁵⁷ See *infra* Parts VI.C–E.

¹⁵⁸ See Elizabeth Evenson & Jonathan O'Donohue, *States shouldn't use ICC budget to interfere with its work*, AMNESTY INT'L (Nov. 23, 2016), available at <https://www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/> (last visited Dec. 19, 2021).

¹⁵⁹ Andrew Murdoch, *UK statement to ICC Assembly of States Parties 17th session* (Dec. 5, 2018), [https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session#:~:text=The%20United%20Kingdom%20is%20determined,Syria%2C%20Iraq%2C%20and%20Burma; Eduardo Reyes, UK puts pressure on Hague court over 'lawfare', L. GAZETTE \(Dec. 12, 2019\), available at https://www.lawgazette.co.uk/news/uk-puts-pressure-on-hague-court-over-lawfare/5102467.article](https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session#:~:text=The%20United%20Kingdom%20is%20determined,Syria%2C%20Iraq%2C%20and%20Burma; Eduardo Reyes, UK puts pressure on Hague court over 'lawfare', L. GAZETTE (Dec. 12, 2019), available at https://www.lawgazette.co.uk/news/uk-puts-pressure-on-hague-court-over-lawfare/5102467.article) (last visited Oct. 23, 2021).

without seeking investigation, notwithstanding evidence that eligible crimes had been committed.¹⁶⁰ While it is impossible to gauge the impact of an individual piece of diplomatic pressure on the decision to drop the inquiry, human rights organizations have criticized the U.K.'s use of funding leverage to influence the OTP.¹⁶¹

Similarly, alongside its litigation efforts, Kenya attempted to work through the ASP system to alter the procedures of the ICC. The government of Kenya unsuccessfully lobbied the ASP to pass Rome Statute amendments enhancing head of state immunity, though it managed to pass a Rules of Procedure and Evidence amendment excusing leaders subject to summonses from personally appearing before the Court when doing so would conflict with their public duties.¹⁶² There are clearly advantages to engaging actors within the ICC, either as an ASP member or by leveraging ASP allies.¹⁶³ While ASP members have more direct influence, non-parties like the United States routinely attend the Assembly as observers.¹⁶⁴ Of course, as the comparative experiences of the U.K. and Kenya suggest, the impact of diplomatic strategies may hinge on factors such as the state's leverage in the international community and influence as an ICC funder.

B. STATES LOBBY THE SECURITY COUNCIL FOR ARTICLE 16 DEFERRALS

In addition to leveraging relationships within the ASP, individual states and regional organizations have at times lobbied the Security Council for a deferral of an ICC investigation. Rome Statute Article 16

¹⁶⁰ *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom*, ICC-OTP (Dec. 9, 2020), available at <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk> (last visited Oct. 23, 2021).

¹⁶¹ *United Kingdom: ICC Prosecutor Ends Scrutiny of Iraq Abuses*, HUM. RTS. WATCH (Dec. 10, 2020), available at <https://www.hrw.org/news/2020/12/10/united-kingdom-icc-prosecutor-ends-scrutiny-iraq-abuses> (last visited Oct. 23, 2021).

¹⁶² See Helfer & Showalter, *supra* note 134, at 29–32.

¹⁶³ Other opportunities to influence the ICC through the ASP include participation in its Working Groups and direction of commissions such as the recent Independent Expert Review. See *supra* Part II; GROUP OF INDEPENDENT EXPERTS, *supra* note 9.

¹⁶⁴ E.g., David Clarke, *U.S. to attend Hague court meeting as observer*, REUTERS (Nov. 16, 2009), available at <https://www.reuters.com/article/us-usa-icc/u-s-to-attend-hague-court-meeting-as-observer-idUSTRE5AF30A20091116> (last visited Oct. 23, 2021).

permits the Security Council to initiate a twelve-month deferral of an ICC investigation via Chapter VII resolution.¹⁶⁵ The African Union lobbied for a deferral of the Sudan investigation, but the Security Council demurred, leading the African Union to unsuccessfully advocate for an amendment to Article 16 placing deferral power into the hands of the UN General Assembly when the Security Council “fails to act.”¹⁶⁶ Kenya launched three separate campaigns for an Article 16 deferral into its situation in 2011, 2013, and 2015, backed by the African Union.¹⁶⁷ The Security Council again chose not to issue a deferral, but the efforts helped Kenya politicize the situation by garnering support for its stance that Western states were using the ICC to infringe on Kenya’s sovereignty.¹⁶⁸ Thus, though the Security Council has never exercised its Article 16 powers, campaigning for a deferral can still serve a rhetorical and political purpose.

C. STATES REACH OUT PRIVATELY TO THE OTP TO EXERT INFLUENCE BEHIND THE SCENES

Beyond public diplomacy, states also seek to alter the focus of inquiries through informal contact with ICC actors. While cooperative states naturally work with the Prosecutor, it is striking that states not intending to participate in formal litigation may also reach out to the OTP, typically during the preliminary examination phase to discourage or delay investigation. In the early years of the preliminary examination in Georgia, the Russian government allowed the OTP to visit Moscow, submitted twenty-eight volumes of evidence of crimes committed by Georgians, and facilitated the submission of complaints by South

¹⁶⁵ States have sought these in the past, but none have been granted. *See, e.g.*, UN Department of Public Information, *Security Council Resolution Seeking Deferral of Kenyan Leaders’ Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining* (Nov. 15, 2013), available at <https://www.un.org/press/en/2013/sc11176.doc.htm> (last visited Nov. 18, 2021).

¹⁶⁶ *See* African Union, *Decision on the Implementation of the Decisions on the International Criminal Court*, Doc. EX.CL/639(XVIII), Assembly/AU/Doc.334(XVI) 7 (Jan. 31, 2011), available at https://au.int/sites/default/files/decisions/9645-assembly_en_30_31_january_2011_auc_assembly_africa.pdf (last visited Nov. 18, 2021).

¹⁶⁷ Helfer & Showalter, *supra* note 134, at 11–18.

¹⁶⁸ *Id.* at 17.

Ossetians concerning Georgian violence.¹⁶⁹ Through cooperation, Russia perhaps intended to direct the focus of the inquiry towards conduct by Georgians and spread the OTP's resources thin across a broad swath of evidence. The outreach also seemed to make the OTP reluctant to alienate Russia.¹⁷⁰ One OTP official acknowledged that major power influence "loomed large" in the early 2010s, during which time the OTP was hesitant to push for an investigation against Russia.¹⁷¹ Only once the OTP ramped up involvement in Ukraine and expressed an intention to transition from preliminary examination to investigation in Georgia did Russia shift from informal engagement to hostility.¹⁷² Major powers like Russia are not the only ones who perceive benefits from such forms of outreach; for example, Burundi continued to provide information to the OTP despite publicly announcing noncooperation and withdrawing from the Rome Statute.¹⁷³ States evidently use informal outreach to influence the scope of investigations or build a positive relationship with the OTP, even if they do not plan to comply with an eventual investigation.

D. STATES GENERATE GOOD WILL BY SUPPLYING ASSISTANCE IN OTHER DOMAINS

The OTP is receptive to other forms of extrajudicial support as well. The Bush administration treated the ICC with distrust and animosity in its early years of operation.¹⁷⁴ However, the U.S. began to relax its

¹⁶⁹ Kevin Jon Heller, *Russia's Short-Sighted Approach to the Georgia Investigation*, OPINIOJURIS (Feb. 13, 2016), available at <http://opiniojuris.org/2016/02/13/russias-short-sighted-approach-to-the-icc/> (last visited Nov 1, 2021); BOSCO, *supra* note 88, at 160.

¹⁷⁰ Contemporaneous OTP reports spoke optimistically of Russia's domestic investigative efforts despite a lack of prosecutions. PE Report 2015, *supra* note 4, at 58.

¹⁷¹ BOSCO, *supra* note 88, at 174.

¹⁷² See *supra* Part VII.A.

¹⁷³ *Report on Preliminary Examination Activities (2017)* 63, 67, ICC-OTP (Dec. 4, 2017) [hereinafter PE Report 2017], available at https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf (last visited Nov. 1, 2021).

¹⁷⁴ For example, the U.S. refused to formally engage with the Court, held up UNSC resolutions until it secured ICC immunity for peacekeepers, and negotiated a web of art. 98 agreements preventing other states from supporting the Court in situations concerning the U.S. *UN Peacekeepers exempted from war crimes prosecution for another year*, UN NEWS (June 12, 2003), available at <https://news.un.org/en/story/2003/06/71102-un-peacekeepers-exempted-war-crimes-prosecution-another->

allegations against the U.S. in her 2014 Preliminary Examinations Report, but she did so by citing public documents from the U.S. Senate Armed Service Committee's inquiry;¹⁸² in other words, the secret was out, so the U.S. could not blame the Prosecutor for reputational harm associated with the allegations. The experience of the Obama administration suggests a potential willingness by the OTP to work to accommodate the interests of states—even non-parties—who lend valuable support to the OTP's efforts across other investigations, though such accommodation may not always be possible.

E. NON-PARTY STATES RELYING ON EXTRAJUDICIAL ENGAGEMENT FACE MINIMAL RISKS

In the early years of the Palestinian preliminary examination, Israel facilitated a visit from OTP staff to Israel and Palestine, submitted evidence to the OTP of crimes by Hamas and other pro-Palestine armed groups, contested allegations against the Israel Defense Forces, and provided information on Israel's domestic inquiries.¹⁸³ The Prosecutor nonetheless concluded in 2019 that there was a basis to proceed with an investigation in Palestine.¹⁸⁴ In response to Prosecutor's push for an investigation, hardline pro-Israel advocates have argued that Israel's policy of engagement failed,¹⁸⁵ but it is unclear how the Israeli government is worse off for its efforts. During Israel's five years of contact, the Prosecutor consistently declined to investigate alleged Israeli crimes in the Gaza flotilla raid, despite a referral of the situation to the

[cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF](https://www.icc-cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF) (last visited Oct. 31, 2021).

¹⁸² *Report on Preliminary Examination Activities (2014)* 22, ICC-OTP (Dec. 2, 2014) [hereinafter PE Report 2014], available at <https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf> (last visited Oct. 31, 2021).

¹⁸³ See PE Report 2015, *supra* note 4, at 17; PE Report 2018, *supra* note 76, at 65; *Report on Preliminary Examination Activities (2019)* 57, ICC-OTP (Dec. 5, 2019) [hereinafter PE Report 2019], available at <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf> (last visited Oct. 31, 2021).

¹⁸⁴ *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction*, *supra* note 58.

¹⁸⁵ See, e.g., Caroline Glick, *A five-step plan to fight the ICC*, JEWISH NEWS SYNDICATE, available at <https://www.jns.org/opinion/a-5-step-plan-to-fight-the-icc/> (last visited Nov. 1, 2021).

Court by the Comoros.¹⁸⁶ Meanwhile, repeated interaction allowed Israel to form a deeper understanding of the inner workings of the ICC and compelled the OTP to expend resources examining conduct by actors like Hamas.¹⁸⁷ Though the OTP ultimately decided to seek an investigation, Israel presumably managed the above without providing any information that the OTP could not otherwise access and retained the flexibility to adopt a hardline stance when the OTP pushed for an investigation. One could argue that Israel legitimized the OTP's eventual push for an investigation by not repudiating the OTP from the start, but it is difficult to see how that cost will materialize.

The examples of non-party states like Russia, the U.S., and Israel, who each quickly transitioned from informal engagement to total repudiation of the ICC,¹⁸⁸ illustrate why states objecting to a preliminary examination may be willing to engage with the Prosecutor. Through engagement, states can spend years attempting to delay and redirect the focus of an investigation while straining the OTP's resources. States may then retreat to the hostile posture that they otherwise would have adopted as soon as the OTP pushes for an investigation.

VII. Repudiation

Some states choose to abandon any pretense of constructive engagement and instead repudiate the ICC, seeking to delegitimize and derail its investigations. To understand the tradeoffs of the repudiation approach, it is necessary to first outline the broad range of actions beneath the umbrella of repudiation. After surveying the tools available to those choosing to repudiate the Court, it is then possible to analyze the advantages and drawbacks of this approach for states in different diplomatic positions.

A. STATES DRAW FROM A BROAD SET OF OPTIONS TO REPUDIATE THE ICC

The harbinger of a transition to repudiation is typically a public denouncement of the ICC's claim of jurisdiction. As described, Russia

¹⁸⁶ See *Notice of Prosecutor's Final Decision under rule 108(3), as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019*, ICC-OTP (Dec. 2, 2019), available at https://www.icc-cpi.int/CourtRecords/CR2019_07298.PDF (last visited Nov. 1, 2021).

¹⁸⁷ See PE Report 2020, *supra* note 3, at 56.

¹⁸⁸ See *infra* Part VII.

communicated extensively with the OTP in the early years of the Georgian investigation.¹⁸⁹ However, the Russian government soured on the ICC after its unfavorable determinations in Ukraine and potential to become involved in Syria, as the Foreign Ministry began issuing statements in 2015 calling the ICC's perspective "far from reality" and accusing it of "taking the aggressor's side."¹⁹⁰ By the end of 2016, days after the OTP determined that the situation in Ukraine amounted to an international armed conflict,¹⁹¹ Russia withdrew its signature from the Rome Statute (largely a symbolic gesture, as Russia never actually ratified the treaty), claiming that the ICC was "ineffective and one-sided" and expressing solidarity with movements within the African Union to abandon the Court.¹⁹² In addition to attacking the ICC's fairness and efficacy, states may refuse to allow the OTP to access the region under investigation and may restrict access from other civil society and aid organizations to substantiate their verbal attacks on the Court with more tangible stakes.¹⁹³

Despite not formally engaging with the ICC, states hoping to oppose the proceedings may also seek to enhance the credibility of their rhetoric by publicly releasing legal arguments rebutting the ICC's position. Israel, for example, responded to the Prosecutor's request for a territorial ruling in Palestine by releasing a thirty-four-page memo contesting ICC jurisdiction.¹⁹⁴ Similarly, a month after the ICC announced a preliminary examination in the Philippines, President Duterte publicly released a brief

¹⁸⁹ See *supra* Part VI.C; BOSCO, *supra* note 88, at 160.

¹⁹⁰ ICC Prosecutor Visits Georgia, U.N. ASSOC. OF GEORGIA (Oct. 15, 2015), available at <https://old.civil.ge/eng/article.php?id=28657> (last visited Nov. 1, 2021); Ministry of Foreign Affairs of the Russian Federation, *Briefing by Foreign Ministry Spokesperson Maria Zakharova* (Jan. 29, 2016), available at https://www.mid.ru/en/press_service/spokesman/briefings/-/asset_publisher/D2wHaWMCU6Od/content/id/2039123#7 (last visited Nov. 1, 2021).

¹⁹¹ PE Report 2016, *supra* note 54, at 35.

¹⁹² Ministry of Foreign Affairs of the Russian Federation, *Statement by the Russian Foreign Ministry* (Nov. 16, 2016), available at https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566 (last visited Nov. 1, 2021).

¹⁹³ Sudan expelled a dozen aid organizations from Darfur after arrest warrants were issued against Sudanese government officials. *Sudan Expels Aid Groups in Response to Warrant*, NBC NEWS (Mar. 3, 2009, 3:23PM) available at <https://www.nbcnews.com/id/wbna29492637> (last visited Nov. 1, 2021); BOSCO, *supra* note 88, at 155.

¹⁹⁴ State of Israel Office of the Att'y Gen., *supra* note 144.

setting forth his basis for opposing the ICC's exercise of jurisdiction.¹⁹⁵ While such documents do not carry the same weight in Court as a formal submission, proxies may raise the same arguments on a state's behalf.¹⁹⁶

States have also tried to incite movements to withdraw from the ICC. Burundi and the Philippines both withdrew their signatures after the OTP opened preliminary examinations into their countries,¹⁹⁷ while South Africa and Kenya lobbied the African Union for mass withdrawal.¹⁹⁸ As mentioned, Russia expressed solidarity with these other movements through its symbolic withdrawal.¹⁹⁹ Mass withdrawal has failed to materialize to date, however, as Burundi and the Philippines are the only states parties who followed through on threats to withdraw.²⁰⁰

Sudan, meanwhile, undermined the ICC's legitimacy by flouting its arrest warrants. Sudanese head of state Omar al-Bashir traveled widely to

¹⁹⁵ *Statement of the President of the Republic of the Philippines on the Jurisdiction of the International Criminal Court* (Mar. 13, 2018), available at <https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal/> (last visited Sept. 27, 2021).

¹⁹⁶ ICC, *Rules of Procedure and Evidence*, ICC-ASP/1/3, Rule 103; see *supra* Part V.C.

¹⁹⁷ *Report on Preliminary Examination: Burundi*, ICC-OTP (Jan. 17, 2021), available at <https://www.icc-cpi.int/Burundi> (last visited Nov. 1, 2021); *Report on Preliminary Examination: The Philippines*, ICC-OTP (Jan. 1, 2021), available at <https://www.icc-cpi.int/Philippines> (last visited Nov. 1, 2021).

¹⁹⁸ Heidi Vogt, *Kenyan Parliament Votes to Withdraw from International Criminal Court*, WALL ST. J. (Sept. 5, 2013), available at <https://www.wsj.com/articles/kenyan-parliament-votes-to-withdraw-from-international-criminal-court-1378413586> (last visited Nov. 1, 2021); *African Union Backs mass withdrawal from ICC*, BBC (Feb. 1, 2017), available at <https://www.bbc.com/news/world-africa-38826073> (last visited Nov. 1, 2021).

¹⁹⁹ Ministry of Foreign Affairs of the Russian Federation, *Statement by the Russian Foreign Ministry* (Nov. 16, 2016), available at https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566 (last visited Oct. 28, 2021).

²⁰⁰ Gambia and South Africa both announced decisions to withdraw from the ICC but ultimately rescinded these decisions before withdrawal took effect. Elise Keppler, *Gambia Rejoins ICC*, HUM. RTS. WATCH (Feb. 17, 2017), available at <https://www.hrw.org/news/2017/02/17/gambia-rejoins-icc> (last visited Oct. 30, 2021); *South Africa revokes ICC withdrawal after court ruling*, BBC (Mar. 8, 2017), available at <https://www.bbc.com/news/world-africa-39204035#:~:text=South%20Africa%20has%20revoked%20its,ICC%20pursued%20%22regime%20change%22> (last visited Oct. 30, 2021); see *Report on Preliminary Examination: Burundi*, ICC-OTP (Jan. 17, 2021), available at <https://www.icc-cpi.int/Burundi> (last visited Nov. 1, 2021); *Report on Preliminary Examination: The Philippines*, ICC-OTP (Jan. 1, 2021), available at <https://www.icc-cpi.int/Philippines> (last visited Nov. 1, 2021).

ICC states in spite of the warrant out for his arrest, even participating in a 2009 Arab League summit that had UN Secretary-General Ban Ki-moon in attendance.²⁰¹ The African Union decided its member states were not obligated to enforce the warrants, leading to the aforementioned litigation between the OTP and states that refused to enforce the warrants on the basis of head of state immunity.²⁰² States like South Africa then began to consider withdrawal over the immunity issue.²⁰³ The OTP's main recourse to al-Bashir's defiance was to plead for assistance to a Security Council that had cooled considerably on supporting the ICC by 2014.²⁰⁴ The Sudan investigation grinded to such a halt that the OTP had to issue an ignominious clarification that it "has not fully suspended investigations into the alleged crimes committed in Darfur" but admitted "with its finite resources and heavy case-load, it is difficult for the Office to fully commit to active investigations of the crimes in Darfur."²⁰⁵ Evidently, Sudan's approach was successful for a time at demoralizing the OTP and impeding its investigation.

States repudiating the ICC have also taken more direct measures to hamstring the ICC's ability to conduct an investigation. One such tactic is to provide amnesty for targets of investigations. Grants of domestic amnesty do not have any bearing on the OTP's authority to prosecute an individual,²⁰⁶ but it can create domestic legal obligations that deter actors from cooperating with the Court. For example, the Court repeatedly struck down Saif Gaddafi's arguments that his amnesty rendered his case inadmissible, but the amnesty ostensibly prevents local actors from assisting the ICC in his extradition, and he remains at large.²⁰⁷

²⁰¹ BOSCO, *supra* note 88, at 156.

²⁰² *Id.* at 151; *see supra* Part V.C.

²⁰³ *South Africa to withdraw from war crimes court*, BBC (Oct. 21, 2016), available at https://www.bbc.com/news/world-africa-37724724?ocid=socialflow_twitter (last visited Oct. 29, 2021).

²⁰⁴ *See, e.g., Russia and China Veto UN Move to Refer Syria to ICC*, BBC (May 22, 2014), available at <https://www.bbc.com/news/world-middle-east-27514256>.

²⁰⁵ *Twenty-First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, ¶ 7, ICC-OTP (2015), available at https://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Dafur_%20Sudan.pdf (last visited Oct. 29, 2021).

²⁰⁶ *See* Press Release, ICC-OTP, *Saif Al-Islam Gaddafi case: ICC Appeals Chamber confirms case is admissible before the ICC*, ICC-CPI-20200309-PR1518 (Mar. 9, 2020), available <https://www.icc-cpi.int/news/saif-al-islam-gaddafi-case-icc-appeals-chamber-confirms-case-admissible-icc#:~:text=Today%2C%209%20March%202020%2C%20the,the%20admissibility%20of%20this%20case.>

²⁰⁷ *Id.*

Similarly, leaders of states have relied on head of state immunity arguments to resist arrest warrants.²⁰⁸

In a controversial campaign to hamper the Court's ability to conduct future investigations, the U.S. negotiated a series of bilateral immunity agreements in the early years of the ICC to take advantage of Rome Statute Article 98,²⁰⁹ which prohibits the Court from requesting assistance from a state in violation of its obligations to another state under international law.²¹⁰ Importantly, Article 98 agreements do not actually prevent the ICC from having jurisdiction over a case.²¹¹ Therefore, these agreements cannot be used to legally preclude the ICC from opening an investigation, though they might prevent states from helping the OTP gather evidence.²¹² Dozens of agreements remain in place barring countries from providing assistance to the Court in investigations implicating the U.S.²¹³

Finally, a particularly harsh measure a few states have taken to repudiate the ICC is the use of sanctions. As discussed, the U.S. developed a tentative working relationship with the ICC under President Obama, albeit navigating tensions over the OTP's involvement in Afghanistan.²¹⁴ When the OTP intensified inquiries into the situations in Afghanistan and Palestine, the Trump administration pivoted towards repudiation, issuing a June 2020 executive order applying sanctions against those who assist ICC investigations as well as agents and the

²⁰⁸ See *supra* Part V.C (describing proxy litigation regarding al-Bashir's claim to head of state immunity); *Statement of the President of the Republic of the Philippines on the Jurisdiction of the International Criminal Court* (Mar. 13, 2018), available at <https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal/> (last visited Sept. 27, 2021) ("Moreover, the ICC cannot subject the President of the Philippines to any investigation during his tenure following the doctrine of the immunity from suit of the President while in office.").

²⁰⁹ BOSCO, *supra* note 88, at 73–74.

²¹⁰ Rome Statute, *supra* note 10, at art. 98.

²¹¹ See Situation in the Republic of Afghanistan, ICC-02/17-7-Conf-Exp, Request for authorisation of an investigation pursuant to article 15, 27 n.47 (Nov. 20, 2017), available at https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF (last visited Oct. 27, 2021) (regarding the OTP's interpretation of the relationship between SOFAs and ICC jurisdiction).

²¹² *Id.*

²¹³ *International Criminal Court – Article 98 Agreements Research Guide*, GEO. L. LIBR. (Oct. 23, 2018), available at <https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099> (last visited Oct. 27, 2021).

²¹⁴ See *supra* Part VI.D.

family members of agents acting on behalf of the ICC.²¹⁵ Israeli Prime Minister Netanyahu called for citizens of other democracies to pressure their governments into sanctioning the ICC as well.²¹⁶ Still, the extreme measure of sanctioning the ICC's institutional actors is uncommon, has been widely condemned,²¹⁷ and has potential to backfire.²¹⁸ States have also tried to sanction other states directly, as Sudan threatened Kenya with trade and economic sanctions after the Kenyan High Court issued arrest warrants against al-Bashir in compliance with the ICC.²¹⁹

B. STATES USE REPUDIATION TO BENEFIT FROM WEAK ENFORCEMENT AND DELEGITIMIZATION

Having outlined the range of repudiation tactics available to states, it is possible to analyze their strengths and weaknesses. Before digging into specifics, it is worth noting that one overarching appeal of the repudiation approach stems from its nature as a blunt instrument: many of these brash tactics yield gratifying short-term benefits, like making repudiating leaders appear tough in front of constituents. The costs, on the other hand, may not always be as immediate or as plainly visible.

The simplest advantage of the antagonistic approach is that the ICC relies on states to enforce its authority, and so powerful repudiators may face very few consequences for noncooperation. If the repudiating state is party to the Rome Statute, the Court can make a referral for noncooperation to the ASP, or if the investigation was opened upon direction of the Security Council, the OTP can criticize the state's noncooperation in its reports to the Security Council.²²⁰ In either instance, a hostile state may be able to use its diplomatic position to

²¹⁵ Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

²¹⁶ See Oliver Holmes, *Netanyahu calls for sanctions over ICC war crimes investigation*, GUARDIAN (Jan. 21, 2020), available at <https://www.theguardian.com/world/2020/jan/21/netanyahu-calls-for-sanctions-over-icc-war-crimes-investigation-israel> (last visited Oct. 27, 2021).

²¹⁷ See *Scores of countries back ICC in face of US sanctions*, AL JAZEERA (June 24, 2020), available at <https://www.aljazeera.com/news/2020/06/scores-countries-icc-face-sanctions-200624025450554.html> (last visited Oct. 27, 2021).

²¹⁸ See *infra* Part VII.C (discussing states' responses to U.S. sanctions).

²¹⁹ Luis Moreno-Ocampo, *Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005) 5* (Dec. 15, 2011), available at <https://www.icc-cpi.int/NR/rdonlyres/726561CB-7FB5-46BC-9E68-C03279343001/284124/20111215ProsecutorsstatementtoUNSConDarfur1.pdf> (last visited Oct. 27, 2021).

²²⁰ Rome Statute, *supra* note 10, at art. 87.

overcome whatever pressure the international community might apply. Indeed, the government of Sudan was able to spurn ICC authority for over a decade because its power within the African Union and Arab League insulated it from the ICC's reach.²²¹ Noncompliance became even more viable after Russia, China, and the U.S. pivoted away from the ICC in the late 2010s,²²² making Security Council referral unlikely in new territories and reducing pressure to comply in existing situations.

A more abstract advantage to repudiating the ICC is the preservation of objections to its authority. The OTP has justified investigations using theories of international law rejected by some states: against non-party states such as the U.S. acting on the territory of a state party;²²³ against non-party states such as Myanmar for conduct that flows into the territory of a state party,²²⁴ where territorial bounds are contested, as in Palestine;²²⁵ and against heads of state like al-Bashir.²²⁶ Thus, states may seek to avoid conferring legitimacy upon the ICC in situations predicated on theories of jurisdiction that they oppose. The legitimacy issue also extends to smaller international law determinations made over the course of ICC involvement: Russia's symbolic withdrawal came two days after the OTP's finding that the conflict in Crimea amounted to an international

²²¹ See *supra* Part VII.A.

²²² See, e.g., *Russia and China Veto UN Move to Refer Syria to ICC*, BBC (May 22, 2014), available at <https://www.bbc.com/news/world-middle-east-27514256>; Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

²²³ Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan ¶¶ 4, 79 (Mar. 5, 2020).

²²⁴ Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute of the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar ¶ 62 (Nov. 14, 2019); see Tanushree Nigam, *Basis and Implications of the ICC's Ruling Against Myanmar*, PUBLIC INT'L L. & POL'Y GROUP (Dec. 22, 2019), <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2020/5/22/basis-and-implications-of-the-iccs-ruling-against-myanmar> (last visited Jan. 16, 2022);

²²⁵ See *supra* Part V.C.; Press Release, ICC, *ICC Pre-Trial Chamber I issues its decision on the Prosecutor's request related to territorial jurisdiction over Palestine*, ICC-CPI-202100205-PR1566 (Feb. 5, 2021), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1566> (last visited Oct. 26, 2021).

²²⁶ Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal 26–27 (May 6, 2019); see *supra* Part V.C.

armed conflict with Russia as an occupying force.²²⁷ Similarly, many believe the Trump administration's hardline stance came as much in response to the request for a territorial determination in Palestine as in response to the ICC's investigation in Afghanistan.²²⁸ For these and other reasons, a handful of states have settled into a scorched-earth posture of repudiation towards the ICC.

C. STATES CHOOSING REPUDIATION POTENTIALLY FACE SIGNIFICANT COSTS

Notwithstanding the advantages of a hostile posture, this Article has identified numerous instances of states with adverse objectives to the OTP choosing to engage with the Court in some fashion.²²⁹ Indeed, an entirely antagonistic approach sacrifices certain leverage points. To assess the costs of repudiation, it is important to keep in mind that considerations depend on a state's position. Some states may take a hardline stance to the ICC as a matter of regime survival, because its investigations implicate crimes by their leadership.²³⁰ Such states are in a more desperate position than major powers,²³¹ who may take a hardline stance not because there is serious threat of the OTP bringing their citizens before the Court without their consent, but because its investigations interfere with their foreign policy objectives or impose reputational harms.

Some states may look to al-Bashir's fifteen years of ICC resistance as an example favoring total repudiation, but it is important not to overlook the implications of this policy. The government of Sudan, having committed heinous crimes, became a pariah state ostracized by

²²⁷ See PE Report 2016, *supra* note 54, at 35; *Statement by the Russian Foreign Ministry*, RUSS. MINISTRY OF FOREIGN AFF., (Nov. 16, 2016), available at https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566 (last visited Oct. 30, 2021).

²²⁸ See Ward, *supra* note 2.

²²⁹ See *supra* Part VI; see, e.g., *ICC prosecutor suspends probe into Philippines drugs war*, REUTERS (Nov. 19, 2021), available at <https://www.reuters.com/world/asia-pacific/icc-prosecutor-suspends-probe-into-philippines-drugs-war-2021-11-19/> (last visited Dec. 20, 2021) (reporting that OTP suspended its Philippines investigation after receiving an Article 18 deferral request from Philippines in November 2021, two years after Philippines withdrew from the ICC).

²³⁰ Sudan, for example. See *supra* Part VII.A.

²³¹ See *supra* Part VII.A (discussing repudiation of the ICC by Russia and the U.S.).

international institutions,²³² though, admittedly, it was able to rely on its power in the AU and Arab League to stave off the ICC's enforcement efforts for several years.²³³ Many smaller states do not have the regional influence necessary to replicate the longevity of the al-Bashir regime as an enemy of the international community. A state potentially facing ICC investigation that has not squandered all goodwill in the international sphere may prefer a more moderate course, even if it does not want to formally engage with the Court, to prevent hostility with one international institution from compounding across others. Still, as long as dictators remain in power who have committed human rights abuses for which there is no just resolution short of regime change, one would realistically expect a subset of pariah states to continue to repudiate the ICC.

As for the second batch of states—major powers with foreign policy objectives and reputational interests implicated by the ICC—a posture of hostility is not a given, and it may relinquish a fair amount of leverage. The sanctions regime of the United States, for example, simultaneously emboldened the ICC and locked the ICC into its course of action. Sixty-seven countries, including Canada and the U.K., issued a joint statement in support of the ICC and in condemnation of the Trump administration's sanctions;²³⁴ such an extreme posture by the U.S. evidently brought about its own reputational harms. Additionally, the OTP faced steep audience costs if it wanted to search for a compromise in the Afghanistan situation. To succumb to U.S. sanctions would have sent the message that any state hoping to deter an investigation should start by sanctioning ICC

²³² For example, Sudan is heavily indebted to the IMF, World Bank, and African Development Bank. Sanctions by the international community against the al-Bashir regime prevented Sudan from receiving debt forgiveness, which in turn prevented Sudan from accessing additional funds. *See U.S. move is first step on Sudan's long road to get debt relief*, REUTERS (Dec. 14, 2020), available at <https://www.reuters.com/article/sudan-usa-imf-int/u-s-move-is-first-step-on-sudans-long-road-to-get-debt-relief-imf-idUSKBN28O2PQ> (last visited Oct. 30, 2021).

²³³ *See supra* Part VII.A; BOSCO, *supra* note 88, at 157–159.

²³⁴ *See Scores of countries back ICC in face of US sanctions, supra* note 217; ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC: 2021 REPORT 57 (Apr. 2021), available at <https://www.asil-us-icc-task-force.org/uploads/2021-ASIL-Task-Force-Report-on-US-ICC-Engagement-FINAL.pdf> (“Numerous interlocutors . . . told us that the net effect [of sanctions] was to prompt numerous states, including many that had been expressing concerns about the Court’s performance and the need for reform, to rally in defense of the Court.”).

officials.²³⁵ Lastly, forcing allies into the awkward position of defending the Court in defiance of the U.S. can only serve to erode the strength the U.S. derives from its multilateral relationships over the long term.²³⁶

Moving beyond the U.S. government's particular experience, the possible risks of repudiation are perhaps best understood in light of the advantages of other forms of engagement along the cooperation continuum. The self-referral experiences of Uganda and Ukraine reflect that the OTP responds kindly to collaboration, working with those it perceives to be allies of its investigations.²³⁷ Similarly, the U.K.'s partnership efforts suggest that the OTP prefers not to spar with major powers when it can avoid doing so, but hostile tactics close off the OTP's options to avoid escalation.²³⁸ Additionally, Kenya and Libya's litigation strategies expose the unfortunate reality that the OTP has at times struggled to impose its authority upon unwilling states, even those who participate in the Court's formal procedures.²³⁹ Finally, the U.S. government's own experience during the Obama administration reveals that a state can develop a relationship with the ICC through extrajudicial, informal channels of influence that can potentially be leveraged to reduce certain threats from the ICC, including reputational harms.²⁴⁰ While many states deploy a package of strategies across the continuum depending on their situation, a commitment to repudiation tactics may come at the cost of the flexibility inherent in less confrontational postures.²⁴¹ A handful of regimes have opted for the convenience and

²³⁵ See Press Release, ICC-OTP, *International Criminal Court Condemns US Economic Sanctions*, ICC-CPI-20200902-PR1535 (Sept. 2, 2020), available at <https://www.icc-cpi.int/news/international-criminal-court-condemns-us-economic-sanctions> (stating that the sanctions are "another attempt to interfere with the Court's judicial and prosecutorial independence" and assuring that the "Court continues to stand firmly by its personnel and its mission of fighting impunity").

²³⁶ See ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC: 2021 REPORT, *supra* note 234, at 54–55. ("[T]he United States' relationship with the ICC is both affected by, and is a part of, its wider approach to multilateral engagement and other international organization. The great majority of U.S. friends and allies . . . are Rome Statute parties and are committed to the realization of the Court's mission.").

²³⁷ See *supra* Part III.

²³⁸ See *supra* Part IV.

²³⁹ See *supra* Part V.A.

²⁴⁰ See *supra* Part VI.C.

²⁴¹ See ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC: 2021 REPORT, *supra* note 234, at 57 ("U.S. attacks on the Court . . . have come at significant cost to the U.S. reputation and to this country's ability to be an effective voice on issues of importance to it").

disruptive effect of repudiation tactics, and some have found success doing so. Still, for the reasons above, states with objectives in tension with the ICC often prefer various forms of constructive engagement with the Court and the Prosecutor over total repudiation.

VIII. Conclusion

The actions that states take to influence the ICC can be understood on a continuum from cooperation to repudiation. Analysis of these strategies across five categories on the continuum (self-referral, partnership, litigation, extrajudicial engagement, and repudiation) reveals certain contextual factors that shape states' postures toward the Court. This analysis in turn helps explain why states might choose to consistently rely on one specific category of action, deploy a package of strategies across the continuum in outwardly incongruous ways, or alter course dramatically over the life cycle of ICC involvement.

States hoping to leverage OTP involvement may self-refer a situation before it has drawn ICC scrutiny. Uganda and Ukraine utilized self-referral and ad hoc acceptance of the ICC's jurisdiction to bring OTP pressure to bear on rival actors, amplify positive perceptions of their roles in the conflict, and obtain favorable international legal determination.²⁴² Meanwhile, other states hoping to preserve their standing in the ASP have found success partnering with the OTP to develop domestic justice mechanisms at the preliminary examination stage. Partnership with the OTP under the principle of positive complementarity can serve the twin aims of benefitting from ICC support in a transitional justice setting, as Colombia found, and staving off ICC investigation, as in the case of the U.K.²⁴³ However, partnership requires substantial commitment, skilled bargaining, and a willingness to compromise on the OTP's priorities. Otherwise, the partnership may founder and trigger investigation, as it did for Nigeria.²⁴⁴ As a situation transitions into the investigation phase, the experiences of Kenya and Libya reveal that direct litigation can offer significant upside, such as getting cases dismissed on grounds of inadmissibility or insufficient evidence.²⁴⁵ The risks inherent in litigation are mitigated both by the Court's struggles with enforcement and by the ability for hostile states to litigate by proxy, as demonstrated by Israel and Sudan.²⁴⁶

²⁴² See *supra* Part III.

²⁴³ See *supra* Part IV.

²⁴⁴ *Id.*

²⁴⁵ See *supra* Part V.

²⁴⁶ *Id.*

An array of extrajudicial actions is also available to states at every stage of ICC involvement. While most states use extrajudicial tactics in some form, such as the U.K. leveraging its power in the ASP, it is particularly noteworthy that non-party states with serious objections to ICC involvement, including Russia, Israel, and the U.S., have relied on extensive extrajudicial engagement to try to exert influence over the Court and the OTP.²⁴⁷ Still, these states and others have at times turned to strategies of repudiation, seeking to derail ICC involvement. Repudiation offers apparent advantages in thwarting investigations, but comes with significant costs, including the potential sacrifice of the benefits of other strategies along the cooperation continuum.²⁴⁸

Though the foregoing analysis necessarily brought to light some of the ICC's weaknesses, it is a testament to the ICC's institutional strength that an overwhelming majority of states remain committed to the Rome Statute and broadly cooperate with the Court's efforts. State support has provided the OTP with the necessary backing to seek to hold powerful states accountable for grave violations of international criminal law, an experiment which will test the Court's durability in the coming years. As states recalibrate their strategies at this transitional moment, they should glean from the first two decades of the Court's existence that engagement with a multilateral institution like the ICC is never risk-free, but that nuanced forms of constructive engagement may significantly advance states' individual interests, as well as the interests of global justice.

²⁴⁷ See *supra* Part VI.

²⁴⁸ See *supra* Part VII.