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TABLE OF CONTENTS
VOLUME 5 – ISSUE 2

INTERNATIONAL CRIMES AND JUSTICE: INSIGHTS ON THE INTERNATIONAL COURTS' DECISIONS ON THE SITUATION IN UKRAINE

Pages 1-24

 XXX

Francesco Focillo

YAKUZA: JAPAN'S UNDERGROUND SOCIETY IN 21ST CENTURY

Pages 25-66

 XXX

Yufei Lin

JUSTICE DELAYED: UNPACKING INEFFICIENCY IN THE INTERNATIONAL CRIMINAL COURT

Pages 67-80

 XXX

Sabba Salebaigi-Tse

THE ARMED CONFLICT IN THE DEMOCRATIC REPUBLIC OF THE CONGO AND THE INTERNATIONAL CRIMINAL COURT

Pages 81-92

 XXX

Nouredine Soudani

UNIFYING THE LEGAL TAPESTRY: NAVIGATING ICC'S JURISPRUDENTIAL DISARRAY

Pages 93-126

 XXX

Lily Zanjani

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JICL'S INSIGHTS

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OVERVIEW

The Journal of International Criminal Law (*JICL*) is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and publication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and



- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about “ecocide” is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).



Justice Delayed: Unpacking Inefficiency in the International Criminal Court

by Sabba Salebaigi-Tse*

ABSTRACT: The International Criminal Court (ICC) was established with the noble objective of bringing the most heinous perpetrators of crimes, such as genocide, war crimes, and crimes against humanity, to justice. However, the ICC has encountered numerous challenges since its inception, leading to perceptions of inefficiency. This paper aims to explore the multifaceted reasons behind the ICC's perceived inefficiency, including financial constraints, political pressures, geographical limitations, and cultural factors. One significant limitation of the ICC is its restricted jurisdiction when dealing with accused individuals from non-member countries, despite having over 120 parties to the Rome Statute. These limitations have impeded the ICC's ability to effectively carry out its mandate and have raised doubts about its efficacy and value. This paper delves into various factors contributing to the ICC's inefficiency, including its funding mechanisms, external interferences, the process of evidence collection, and the impact of geographic and cultural differences on its efficiency. Furthermore, it examines notable case studies of delays in ICC proceedings, highlighting challenges encountered in prosecuting individuals such as Omar al-Bashir, Uhuru Kenyatta, Muammar Gaddafi, and Saif al-Islam Gaddafi. To provide context, a comparative analysis is conducted with other international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), to evaluate the ICC's efficiency. Finally, this paper proposes strategies for enhancing the ICC's operations and increasing its efficiency. By addressing these issues comprehensively, this research aims to foster a comprehensive understanding of the ICC's inefficiency while exploring potential avenues for improving its ability to effectively fulfill its mandate.

KEYWORDS: Al-Bashir; Evidence Impact; Financial Impact; Gaddafi; International Criminal Court; Kenyatta.

I. Introduction

The International Criminal Court (ICC) was established with the noble mission of bringing perpetrators of the most heinous crimes to justice, including genocide, war crimes, and crimes against humanity.¹ However, since its inception, the ICC has faced numerous challenges that have contributed to its perceived inefficiency.² The reasons behind such an opinion are complex and multifaceted, ranging from financial constraints to political pressures, geographical

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¹ Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34(6) *FORDHAM INT'L L J* 1584 (2011), at 1584-1588.

² Stephen E. Smith, *Is the International Criminal Court Dying? An Examination of Symptoms*, 23 *OREGON REV INT'L L* 73 (2022), at 73-75.

limitations, and cultural factors.³ Despite having over 120 parties to the Rome Statute, the ICC's jurisdiction remains limited in instances where the accused is from a non-member country.⁴ These factors have not only hindered the ICC's ability to carry out its mandate effectively but also led to doubts about its efficacy and value.

There are various factors that contribute to the ICC's inefficiency, which this paper intends to explore. Such topics include how the ICC is funded, external interferences, the process of collecting evidence, and geographic and cultural differences that may affect the efficiency of the ICC. Additionally, this paper will examine case studies of notable delays in the ICC, including challenges faced in prosecuting Omar al-Bashir, Uhuru Kenyatta, Muammar Gaddafi, and Saif al-Islam Gaddafi. Comparisons will be made with other international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), to determine how the ICC's efficiency stacks up in comparison. Finally, this paper will explore strategies for improving the ICC's operations and increasing efficiency. By exploring these issues, this paper intends to offer a comprehensive understanding of the ICC's inefficiency and potential ways to improve its ability to effectively achieve its mandate.

II. What Factors Contribute to the ICC's Inefficiency?

The sheer size and complexity of the ICC make it prone to encountering various challenges that can result in delays or the inefficient use of resources. However, a combination of factors that have accumulated over the past two decades have led to mounting criticism and doubts regarding the efficiency of the ICC. To fully comprehend the challenges that the ICC is currently grappling with, it is essential to take a comprehensive look at the various issues that have caused the court to stagnate. This includes scrutinizing how funding is allocated and utilized, the political and internal interference that impedes the ICC's efficiency, and the socioeconomic factors, such as language, culture, and distance, that impact its operations. Only by examining these factors can we identify potential solutions to enhance the ICC's effectiveness in delivering justice to victims.

A. How Is The ICC Funded?

In its first ten years, the ICC spent approximately EUR 750 million.⁵ The ICC receives funding from several sources, including member states, private individuals and organizations, and international organizations. The primary source of funding for the ICC comes from its member states.⁶ The Rome Statute requires that member states contribute to the Court's budget based on their ability to pay. The largest funders of the ICC are large European economies, Japan,

³ Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis*, 20(2) MELBOURNE J INT'L L 401 (2019), at 401-420; Osvaldo Zavala, *The Budgetary Efficiency of the International Criminal Court*, 18(3) INT'L CRIM L REV 461 (2018), at 485

⁴ Barnes, *supra* note 1, at 1592-1593; Smith, *supra* note 2, at 75; Sang-Hyun Song, *The International Criminal Court: International Criminal Justice for Asia and the World*, 1 APYIHL (2005), at 6; Megan A. Fairlie, *The Hidden Costs of Strategic Communications for the International Criminal Court*, 51 TEXAS INT'L L J 281 (2016), at 302.

⁵ Jonathan O'Donohue, *Financing the International Criminal Court*, 13(1) INT'L CRIM L REV 269 (2013), at 269.

⁶ ICC, *Understanding the International Criminal Court*, ICC-05-009/20 (2020), at 10.

South Korea, Australia, and Brazil.⁷ In addition to member state contributions, the ICC also receives funding from private individuals and organizations. This can include philanthropic donations from individuals or grants from organizations that support the ICC's work.⁸ The ICC also receives funding from international organizations, such as the United Nations.⁹

The budget of the ICC is determined through a three-step process.¹⁰ The first step involves the Court proposing a budget for the upcoming year.¹¹ This proposal is then evaluated by an independent body called the Committee on Budget and Finance (CBF), which comprises 12 members. Civil society organizations are given the opportunity to contribute to the evaluation process during the CBF's annual session.¹² The final step involves the original budget proposal and the CBF's recommendations being examined by the Assembly of States Parties (ASP).¹³ The ASP ultimately decides on the Court's budget through a voting process in which each country has one vote.¹⁴ During treaty negotiations, it was suggested that the United Nations fund the Court but this proposal was abandoned due to opposition from the United States, Germany, and Japan, who are the United Nations' largest contributors.¹⁵

1. What Are the Main Expenditures of the ICC?

In 2002, the ICC's budget request was EUR 30,893,500, which was approved by the ASP.¹⁶ By 2012, this budget had grown to an approved amount of EUR 108,800,000.¹⁷ The majority of the ICC's budget is allocated towards the Court's core functions, which include the investigation and prosecution of international crimes as well as the support of victims and witnesses.¹⁸ Other areas, such as the administration of the Court, the office of the prosecutor, and the defense teams, along with judges' salaries are also budgeted.¹⁹ It is important to understand how much is being allocated for each of these. Judges' salaries and Court operational costs, for example, can be seen as constituting a large amount in comparison to other expenditures. There are 18 judges in three court rooms.²⁰ In 2003, the judges' annual salary was EUR 180,000 each, for a total of EUR 3,240,000.²¹ This was 10.5% of their budget that year.

⁷ Awa Njoworia, Valerie Adamu, *Analyses of the Challenges Faced by the International Criminal Court in the Exercise of Its Jurisdiction*, 6(6) INT'L J L 98 (2020) at 101; Eric Wiebelhaus-Braham, Kristen Ainley, *The Evolution of Funding for the International Criminal Court: Budgets, Donors and Gender Justice*, 22(1) J HUMAN RIGHTS 31 (2023), at 33 .

⁸ Adamu, *supra* note 7, at 101.

⁹ *Id.*

¹⁰ Braham, Ainley, *supra* note 7, at 33.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ O'Donohue, *supra* note 5, at 278.

¹⁷ *Id.*

¹⁸ *Id.*, at 280.

¹⁹ Zavala, *supra* note 3, at 467.

²⁰ O'Donohue, *supra* note 5, at 286.

²¹ ICC, United Nations, International Criminal Court, Assembly of States Parties, Second Session, Official Records: Part III: General Assembly, 2nd Session, 55th plenary meeting, Annex III, UN Doc. ICC-ASP/2/3/Add.1 (Sept. 22, 2003), at 198.

Some other key areas of expenditure for the ICC include costs associated with informing the public about the work of the Court and raising awareness of international justice issues.²² Other expenses stem from travel expenses, secure computers and communication equipment, armored cars and vans, and helicopters to transport to countries where road transportation is difficult or unsafe.²³ Criticism surrounding the spending of the ICC includes the unbelievable cost associated with each trial (EUR 750 million).²⁴ However, it is essential to keep in mind that the expenses of the ICC go beyond just the trial proceedings. Failure by states to arrest and surrender suspects also incurs financial losses for the Court.²⁵

2. How Does Finances Impact the ICC's Efficiency?

Funding challenges can have a significant impact on the ICC's ability to carry out its mandate.²⁶ Without sufficient funding, the ICC may not be able to effectively investigate and prosecute cases, and it may struggle to maintain its operations. For example, the ICC was forced to drop charges against Kenyan President Uhuru Kenyatta due a to lack of evidence, which was partially attributed to a lack of resources for the investigation.²⁷ Funding challenges can also impact the ICC's ability to provide support to victims and witnesses, as the ICC is responsible for outreach and victim support programs.²⁸ Intimidation, death threats, and bribes hinder the ICC's ability to carry out an investigation and collect evidence and may threaten more lives than it tries to protect.²⁹ If the ICC is unable to carry out its mandate effectively, it could lead to a loss of faith in the Court and undermine its credibility and legitimacy.³⁰ This could make it more difficult for the ICC to secure funding in the future, as member states may be hesitant to contribute if they do not believe the Court is operating effectively. Lack of resources can further impact the ICC's ability to attract and retain qualified staff, which is a challenge for the Office of the Prosecutors.³¹

3. Does Financial Reliance on Member States Impact the ICC's Efficiency?

The ICC's reliance on the financial contributions of its member states to operate can be unpredictable and insufficient to cover its expenses.³² This funding structure can have several negative consequences for the ICC's effectiveness.³³ Most notable is how the ICC's budget

²² Zavala, *supra* note 3, at 462-464.

²³ M. Cherif Bassiouni, *International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, 13 NOUVELLES ÉTUDES PÉNALES 37 (1997), at 76-77.

²⁴ O'Donohue, *supra* note 5, at 296.

²⁵ *Id.*

²⁶ Braham, Ainley, *supra* note 7, at 31.

²⁷ Smith, *supra* note 2, at 81.

²⁸ O'Donohue, *supra* note 5, at 280; Stuart Ford, *How Much Money Does the ICC Need?*, in THE LAW AND PRACTICE OF INTERNATIONAL CRIMINAL COURT (Carsten Stahn ed., 2015) at 20.

²⁹ Susanne D. Mueller, *Kenya and the International Criminal Court (ICC): Politics, the Election and the Law*, 8(1) JOURNAL OF L EASTERN AFRICAN STUDIES 25 (2014), at 33.

³⁰ Zavala, *supra* note 3, at 464.

³¹ Song, *supra* note 4, at 3; O'Donohue, *supra* note 5, at 285.

³² Adamu, *supra* note 7, at 101.

³³ Braham, Ainley, *supra* note 7, at 37.

constraints can hamper its ability to carry out investigations and prosecutions efficiently.³⁴ The Court's investigations can be complex, requiring significant resources and expertise to collect evidence and analyze it.³⁵ The ICC also has to conduct investigations in multiple countries and continents, which can add to the logistical and financial challenges. Limited funding can restrict the ICC's ability to hire staff, secure evidence, and carry out investigations, which can significantly slow down or even derail the proceedings.³⁶ Some defence attorneys argue that the ICC is prejudicial towards the defence, as their investigations are never funded in advance and are reimbursed with a delay of several months.³⁷ This results in grave out of pocket expenses for defence lawyers, which can hinder the quality of legal aid the perpetrator receives.³⁸

Furthermore, the ICC's budget constraints can affect the quality of its proceedings. The ICC is a court of last resort, which means that it only intervenes when national authorities are unable or unwilling to carry out their obligations to investigate and prosecute international crimes.³⁹ As such, the ICC is expected to uphold the highest standards of due process and ensure that the accused receives a fair trial.⁴⁰ However, limited funding can affect the quality of legal representation for the accused, the availability of expert witnesses, and the overall quality of the proceedings, which can compromise the integrity of the ICC's decisions.⁴¹

The Court's reliance on voluntary contributions from member states can create the perception that it is beholden to powerful states and their interests.⁴² This perception can lead to accusations of politicization or bias, which can undermine the credibility of the ICC's decisions.⁴³ Additionally, the ICC's funding structure can make it vulnerable to threats or retaliation from member states, which can compromise its independence and impartiality.⁴⁴ As such, the ICC's funding structure undermines its credibility and independence.⁴⁵

Finally, the ICC's financial limitations can affect its ability to implement its sentences and enforce its decisions.⁴⁶ The ICC has no police force or military power to arrest suspects or carry out sentences.⁴⁷ Instead, the ICC relies on member states to arrest and surrender suspects and enforce its sentences.⁴⁸ Limited funding can make it challenging for the ICC to secure the cooperation of member states, which can lead to delays or failures in enforcing its decisions.⁴⁹

³⁴ Adamu, *supra* note 7, at 101; Jenia Iontcheva Turner, *Defense Perspectives on Fairness and Efficiency at the International Criminal Court*, in OXFORD HANDBOOK ON INTERNATIONAL CRIMINAL LAW (Kevin Jon Heller *et al.* eds., 2020), at 15.

³⁵ Song, *supra* note 4, at 3.

³⁶ Turner, *supra* note 34, at 15.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Smith, *supra* note 2, at 78; Brendan Leanos, *Cooperative Justice: Understanding the Future of the International Criminal Court through Its Involvement in Libya*, 80 FORDHAM L REV 2267 (2012), at 2282.

⁴⁰ Annika Jones, *Non-Cooperation and the Efficiency of the International Criminal Court*, COOPERATION AND THE INTERNATIONAL CRIMINAL COURT: PERSPECTIVES FROM THEORY AND PRACTICE (Olympia Bekou, Daley Birkett eds., 2016), at 188.

⁴¹ Adamu, *supra* note 7, at 101.

⁴² Jones, *supra* note 40, at 9.

⁴³ *Id.*

⁴⁴ Mueller, *supra* note 28, at 29; O'Donohue, *supra* note 5, at 280.

⁴⁵ Jones, *supra* note 40, at 9.

⁴⁶ Hans-Peter Kaul, *The International Criminal Court: Current Challenges and Perspectives*, 6 WASH U GLOBAL STUD L REV 575 (2007), at 578.

⁴⁷ *Id.*, at 579.

⁴⁸ *Id.*, at 578; Adamu, *supra* note 7 at 102; Awn Al-Khasawneh, *Reflections on the Efficiency on the International Criminal Court*, ROMANIAN J INT'L L 13 (2012), at 15.

⁴⁹ Jones, *supra* note 40, at 11; Kaul, *supra* note 46, at 579; Adamu, *supra* note 7, at 103.

B. Does External Interference Impact the ICC's Efficiency?

Political pressure from powerful states and a lack of cooperation from states can create significant obstacles for the ICC to carry out its mandate, compromising its independence and credibility.⁵⁰

The threats to the safety and security of ICC staff can affect their ability to carry out investigations and prosecutions in complex and dangerous environments, jeopardizing the success of their work.⁵¹ This is particularly concerning, given that the ICC often operates in complex and dangerous environments. Therefore, ensuring the safety and security of ICC staff is essential for maintaining the integrity and effectiveness of the ICC.⁵² The lack of public support and limited capacity of national justice systems can significantly impact the ICC's ability to gather evidence, secure witnesses, and carry out arrests.⁵³ Without the necessary funding and political will, the ICC may face delays or failures in its operations.

1. How Do Political Pressures Impact the ICC's Efficacy in Carrying Out Its Mandate?

The ICC is an international institution, and as such, it is subject to the politics of its member states.⁵⁴ The Court's decisions can be influenced by powerful states and their interests, which can compromise the independence and impartiality of the ICC.⁵⁵ Moreover, the ICC's prosecutors have significant discretion in deciding which cases to investigate and prosecute, which can lead to accusations of bias or politicization.⁵⁶ For example, the ICC's decision to investigate allegations of war crimes committed by Sudan's former President, Omar al-Bashir, on genocide charges was driven largely by the ICC's desire to make "a bold demonstration of the court's purpose".⁵⁷ States can also use their political influence to try to influence the outcome of trials before the ICC.⁵⁸ This can take the form of public statements or private communications with ICC judges or prosecutors, or through other means such as offering incentives or threats, which can compromise the fairness and impartiality of the ICC's proceedings and undermine its credibility.⁵⁹ States can exert diplomatic pressure to either encourage or discourage cooperation with the ICC, by threatening to impose sanctions or other penalties on states that assist the ICC or by offering incentives to states that refuse to cooperate.⁶⁰ This can make it challenging for the ICC to carry out investigations and prosecutions effectively and can compromise its independence and impartiality.⁶¹

⁵⁰ Allen S. Weiner, *Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence*, 12 WASH U GLOBAL STUD L REV 545 (2013), at 547.

⁵¹ Adamu, *supra* note 7, at 102.

⁵² Kaul, *supra* note 46, at 579.

⁵³ *Id.*; Adamu, *supra* note 7, at 102-103.

⁵⁴ Weiner, *supra* note 50, at 549; Smith, *supra* note 2, at 88; Adamu, *supra* note 7, at 103.

⁵⁵ Weiner, *supra* note 50, at 549; Braham, Ainley, *supra* note 7, at 37.

⁵⁶ Weiner, *supra* note 50, at 549.

⁵⁷ *Id.*

⁵⁸ Jones, *supra* note 40, at 9.

⁵⁹ *Id.*

⁶⁰ *Id.*; Braham, Ainley, *supra* note 7, at 37.

⁶¹ Adamu, *supra* note 7, at 103.

C. To What Extent Does the Collection of Evidence Impact the Efficiency of the ICC?

The ICC's ability to establish the guilt or innocence of suspects and support its findings and decisions depends on the collection and analysis of evidence.⁶² However, meeting the complex legal and procedural requirements for evidence collection in trials held at the ICC can be a challenging, time-consuming, and resource-intensive process, particularly for cases involving crimes committed across multiple countries with different legal systems.⁶³ The cost of conducting investigations and collecting evidence can be high, and the ICC may need to prioritize its resources based on the cases it's pursuing.⁶⁴ Limited cooperation from some countries significantly undermines the ICC's ability to gather evidence and bring defendants to trial.⁶⁵ Some countries have refused to cooperate with the ICC, while others have been accused of failing to arrest suspects, leading to trial delays and reducing the ICC's efficiency in delivering justice.⁶⁶ Conflict zones or areas of instability are another example of the challenges that the ICC faces when collecting evidence, which further delay or impedes investigations.⁶⁷ Accessing crime scenes and witnesses can be difficult, either due to restricted areas or witnesses' reluctance to come forward due to fear of retaliation or other factors.⁶⁸ Inability to obtain critical evidence or testimony can further delay or hinder the ICC's investigation.⁶⁹

D. To What Extent Do Geographic and Cultural Differences Affect the ICC's Efficiency?

The ICC's efficacy can be hindered by geographic and cultural barriers, as seen in its limited temporal jurisdiction and criticism from African leaders.⁷⁰ Non-member states fall outside the ICC's jurisdiction, resulting in accountability gaps and potential bias towards certain regions.⁷¹ In recent years, the ICC has faced criticism for its narrow focus on African cases, which some argue is because the majority of the ICC member states are African.⁷² African leaders have voiced concerns that the ICC is a neo-colonial institution imposed on Africa, further reinforced by the Court's location in the heart of Europe.⁷³ The trial of Dominic Ongwen, a former Lord's Resistance Army commander, was held in The Hague due to logistical and security reasons,

⁶² Barnes, *supra* note 1, at 1590; Jacob Katz Cogan, *The Problem of Obtaining Evidence for International Criminal Courts*, 22 HUM RT. Q 404 (2000), at 410.

⁶³ Kaul, *supra* note 46, at 578; Adamu, *supra* note 7, at 98; Marc Henzelin, Veijo Heiskanen, Guenael Mettraux, *Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes*, 17 CRIM L FORUM, (2006), at 317. 340-341.

⁶⁴ Henzelin, Heiskanen, Mettraux, *supra* note 63, at 341-342; Kaul, *supra* note 46, at 578.

⁶⁵ Michele Caianiello, *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, 36 N.C.J. INT'L L COM REG 287 (2011), at 299.

⁶⁶ *Id.*

⁶⁷ Kaul, *supra* note 46, at 578.

⁶⁸ *Id.*; Adamu, *supra* note 7, at 98.

⁶⁹ Adamu, *supra* note 7, at 98-99.

⁷⁰ Archangel Byaruhanga Rukooko, Jon Silverman, *The International Criminal Court and Africa: A Fractious Relationship Assessed*, 19 AFRICAN HUM RIGHTS L J 85 (2019), at 98

⁷¹ CATHERINE S. NAMAKULA, LANGUAGE AND THE RIGHT TO FAIR HEARING IN INTERNATIONAL CRIMINAL TRIALS (2014), at 2

⁷² Fairlie, *supra* note 4, at 313; Rukooko, Silverman, *supra* note 70, at 98; Smith, *supra* note 2, at 89; Lana Ljuboja, *Justice in an Uncooperative World: ICTY and ICTR Foreshadow ICC Ineffectiveness*, 32 HOUSE J INT'L L 767 (2010), at 785.

⁷³ Fairlie, *supra* note 4, at 313-314; Rukooko, Silverman, *supra* note 70, at 98; Smith, *supra* note 2, at 81; Ljuboja, *supra* note 72, at 786.

highlighting the challenges of holding ICC proceedings outside the region where the crimes were committed.⁷⁴

Critics of the ICC often argue that for certain cultures involved with the Court, such as Africa, a retributive version of justice is less familiar than a reconciliatory one.⁷⁵ They believe that addressing the consequences of a conflict involves a more varied and complex approach than relying solely on the legal system's power.⁷⁶ For instance, in Northern Uganda, *mato oput*, a customary practice involving the sharing of bitter liquid and a slaughtered animal to seal reconciliation, has been promoted as a more culturally acceptable alternative to the ICC.⁷⁷ Other cultural differences arise in attitudes towards gender or sexual orientation, which can impact the interpretation of evidence related to sexual violence.⁷⁸ Moreover, the ICC's operation in multiple languages can create significant barriers to communication and understanding.⁷⁹ Translating and interpreting evidence and testimony can be time-consuming, costly, and may introduce errors or inconsistencies in the translation process.⁸⁰

III. What Are Some Case Studies of Notable Delays in the ICC?

A closer examination of some of the notable delays in ICC cases can shed light on the various factors that contribute to the Court's inefficiency. The cases of Omar al-Bashir, Uhuru Kenyatta, Muammar Gaddafi and Saif al-Islam Gaddafi are just a few examples of high-profile cases that have faced significant delays. These cases are indicative of the challenges faced by the ICC in investigating and prosecuting international crimes, such as difficulties in gathering evidence, ensuring fair trials, and obtaining cooperation from states.⁸¹

A. What Were the Challenges Faced by the ICC in Prosecuting Omar al-Bashir?

The case of Omar al-Bashir is a primary example of a case with notable delay at the ICC. The case involves charges of war crimes, crimes against humanity, and genocide allegedly committed by the former president in the Darfur region of Sudan.⁸² One significant reason for the delay in the trial was the lack of cooperation from the Sudanese government, which rejected the ICC's jurisdiction over the case and refused to surrender suspects to the Court.⁸³ The former President even traveled to Chad and Kenya after his second indictment, where neither country

⁷⁴ Rukooko, Silverman, *supra* note 70, at 98.

⁷⁵ *Id.*, at 101; Abadir M. Ibrahim, *International Criminal Court in Light of Controlling Factors of the Effectiveness of International Human Rights Mechanisms*, 7 EYES ON THE ICC 157 (2010), at 189.

⁷⁶ Rukooko, Silverman, *supra* note 70, at 101.

⁷⁷ *Id.*

⁷⁸ Fairlie, *supra* note 4, at 302.

⁷⁹ Namakula, *supra* note 71, at 2; NANCY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2013), at 167; JOHN C. FLOYD, INTERNATIONAL INJUSTICE: RWANDA, GENOCIDE, COVER-UP: THE UNITED NATIONS MEDIA TRIAL (2005), at 143.

⁸⁰ Namakula, *supra* note 71, at 2; Joshua Karton, *Lost in Translation: International Criminal Tribunals and the legal implications of interpreted testimony*, 41(1) VANDERBILT J TRANSNATL L 1 (2008), at 1.

⁸¹ Jones, *supra* note 40, at 3.

⁸² Barnes, *supra* note 1, at 1608; Roza Pati, *The ICC and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option*, 15 U.C. DAVIS J INT'L L POLICY 265 (2009), at 266.

⁸³ Adamu, *supra* note 7, at 102; Jones, *supra* note 40 at 3; Pati, *supra* note 82, at 270-271; Emmanuel Sakarombe, *Challenges Facing the International Criminal in Trying to Accomplish Its Mission Focusing on Omar All Bashir's Prosecution*, 5(1) INT'L JL AND PUBLIC POLICY 8 (2023), at 8.

arrested al-Bashir, both claiming that it would have been detrimental to the Sudanese peace process.⁸⁴ The African Union and the Arab League also criticized the ICC's decision to indict a sitting head of state, and several African states threatened to withdraw from the ICC.⁸⁵ Another reason for delay is the complexity of the case, as the prosecution needs to present a significant amount of evidence to prove the charges beyond a reasonable doubt.⁸⁶ Additionally, the ICC needs to ensure that al-Bashir receives a fair trial, which requires significant resources and preparation.⁸⁷ The ICC's limited resources and the competing demands on its time and attention further contribute to the delay.⁸⁸

In 2019, mass protests erupted across Sudan, calling for al-Bashir's ouster, and he was subsequently arrested and held in detention in Sudan.⁸⁹ In December 2019, the new Sudanese government announced that it would hand al-Bashir over to the ICC to face trial for his alleged crimes in Darfur.⁹⁰ However, the trial has been delayed due to logistical and legal challenges, as well as the COVID-19 pandemic.⁹¹ In March 2021, the ICC held a hearing to determine whether al-Bashir should be transferred to the ICC, but the decision was delayed.⁹² As of April 2023, the trial has not yet begun.

1. What Were the Challenges Faced by the ICC in Prosecuting Uhuru Kenyatta?

Another example of a case that faced significant delays and legal challenges is the case against Uhuru Kenyatta, the former President of Kenya, who was indicted by the ICC in 2011 for crimes against humanity related to post-election violence in 2007-2008.⁹³ Kenyatta faced accusations of leading and financing a group of supporters who carried out violent attacks on members of opposing ethnic groups, resulting in the deaths of more than 1,000 people and the displacement of hundreds of thousands of others.⁹⁴ Kenyatta was charged with crimes including murder, deportation, rape, persecution, and other inhumane acts.⁹⁵ However, the case against Kenyatta was withdrawn in 2014 due to insufficient evidence.⁹⁶ The ICC prosecutor stated that the Kenyan government had failed to cooperate fully with the investigation, hindering the Court's ability to build a strong case.⁹⁷

The withdrawal of charges against Kenyatta was seen as a significant setback for the ICC and raised concerns about the Court's ability to hold leaders accountable for international crimes. The delays and legal challenges in the case were due to several reasons, including the difficulty of gathering evidence, protecting witnesses, and ensuring a fair trial.⁹⁸ Additionally, there were allegations of political interference in the case, with some Kenyan politicians

⁸⁴ Adamu, *supra* note 7, at 102; Jones, *supra* note 40, at 5; Barnes, *supra* note 1, at 1585.

⁸⁵ Jones, *supra* note 40, at 5.

⁸⁶ *Id.*, at 6; Pati, *supra* note 82, at 324.

⁸⁷ Jones, *supra* note 40, at 6; Pati, *supra* note 82, at 312.

⁸⁸ Pati, *supra* note 82, at 304.

⁸⁹ Sakarombe, *supra* note 83, at 10.

⁹⁰ Smith, *supra* note 2, at 82; Jones, *supra* note 40, at 6.

⁹¹ Smith, *supra* note 2, at 82.

⁹² *Id.*

⁹³ *Id.*, at 81.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*; Jones, *supra* note 40, at 6.

⁹⁸ Mueller, *supra* note 28, at 29.

accusing Western powers of attempting to undermine Kenyan sovereignty by targeting their leader.⁹⁹

The Kenyatta case highlights the challenges faced by the ICC in investigating and prosecuting international crimes and underscores the need for greater cooperation and support from member states and other stakeholders to ensure that the ICC can carry out its mandate effectively. The failure of states to cooperate with the ICC's investigations, as seen in both the Kenyatta case and the al-Bashir's case, has had an obvious impact on the efficiency of the Court, contributing to a general sense of frustration with the slow pace of justice at the ICC and dissatisfaction with the small number of cases that the Court has seen through to completion.¹⁰⁰

2. What Were the Challenges Faced by the ICC in Prosecuting Muammar Gaddafi and Saif al-Islam Gaddafi?

Muammar Gaddafi, the former leader of Libya, was overthrown in 2011 after a popular uprising and a NATO-led military intervention.¹⁰¹ In the aftermath of his ouster, the ICC launched an investigation into alleged crimes committed during the conflict in Libya, including crimes against humanity.¹⁰² Gaddafi was accused of orchestrating a brutal crackdown on anti-government protesters, including the use of lethal force against peaceful demonstrators.¹⁰³ The ICC issued arrest warrants for Gaddafi; however he was killed by rebel forces in October 2011 before he could be brought to trial.¹⁰⁴ The ICC also issued arrest warrants for Gaddafi's son, Saif al-Islam Gaddafi, who was captured by Libyan authorities in November 2011 and was initially held in detention in Libya.¹⁰⁵ However, the Libyan authorities refused to hand him over to the ICC and insisted on trying him in Libya.¹⁰⁶ The ICC issued a ruling in 2013 stating that Libya could hold a trial for Gaddafi but only if it could prove its ability to conduct a fair trial.¹⁰⁷ However, as the political and social climate in Libya deteriorated, Gaddafi was eventually released from detention in 2017.¹⁰⁸ The Gaddafi case illustrates the importance of strong cooperation and support from member states and other stakeholders to enable the ICC to carry out its mandate effectively, even in challenging and volatile contexts.

3. Do Delays in ICC Proceedings Share Common Themes?

The cases of al-Bashir, Kenyatta, and Gaddafi share several common themes, including the challenges of gathering sufficient evidence to support the charges, political interference, and resistance from member states. In all three cases, the ICC faced difficulties obtaining reliable

⁹⁹ Jones, *supra* note 40, at 7; Marko Milanovic, *Courting Failure: When are International Criminal Courts Likely to Be Believed by Local Audiences?*, in *THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW* (Kevin Jon Heller *et al.* eds., 2016), at 36.

¹⁰⁰ Jones, *supra* note 40, at 8.

¹⁰¹ Leanos, *supra* note 39, at 2269.

¹⁰² John J. Liolos, *Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes*, 35 *BOSTON COLLEGE INT'L COMP L REV* 589 (2012), at 589.

¹⁰³ Sara Kaufman, *Crimes against Humanity and International Human Rights Abuses*, 38 *IELR* 17 (2022), at 19.

¹⁰⁴ *Id.*; Leanos, *supra* note 39, at 2294; Liolos, *supra* note 102, at 591.

¹⁰⁵ Leanos, *supra* note 39, at 2296; Liolos, *supra* note 102, at 591.

¹⁰⁶ Leanos, *supra* note 39, at 2297.

¹⁰⁷ *Id.*

¹⁰⁸ Kaufman, *supra* note 104, at 19.

testimony and physical evidence, particularly in volatile and unstable situations where witnesses were afraid to come forward or were at risk of reprisals.¹⁰⁹ Another common theme was political interference and resistance from member states.¹¹⁰ The ICC faced challenges from African countries in the al-Bashir and the Kenyatta case where governments accused the Court of interfering in their internal affairs.¹¹¹ In the Gaddafi case, the ICC faced difficulties in coordinating with the Libyan authorities and ensuring that Gaddafi received a fair trial.¹¹²

IV. How Do ICC Delays Compare to Other International Criminal Tribunals?

Although the ICC has faced notable delays in prosecuting cases, this is not an issue exclusive to this Court. Other international criminal tribunals have also encountered similar challenges, such as the ICTY and ICTR. Both courts have faced difficulties in areas such as witness protection, funding constraints, and political interference.¹¹³ It is important to note that each international criminal tribunal operates under unique circumstances and faces its own set of challenges. Nevertheless, the problem of delays in prosecuting cases remains a common issue among these institutions. Despite the challenges, significant progress has been made in holding individuals accountable for the most serious international crimes.

A. How Does the Efficiency of the ICC compare to that of the ICTY?

The ICTY was established by the United Nations in 1993 to prosecute individuals responsible for serious international crimes committed during the conflicts in the former Yugoslavia in the 1990s.¹¹⁴ The tribunal operated for more than two decades and prosecuted numerous high-ranking officials and military leaders for their roles in the atrocities committed during the conflict.¹¹⁵ The ICTY encountered significant hurdles in its early years, primarily because it had to construct legal and procedural structures from the ground up, causing initial delays in its proceedings.¹¹⁶ Despite these issues, the ICTY succeeded in prosecuting numerous high-profile cases and convicting several high-ranking officials and military leaders for their involvement in the atrocities committed during the conflict in the former Yugoslavia.¹¹⁷

The ICTY and ICC are two of the most prominent international criminal tribunals established to prosecute individuals for the most serious international crimes. While they differ in their legal frameworks and mandates, both have faced similar challenges in their efforts to hold perpetrators accountable.¹¹⁸ The ICTY faced significant funding constraints throughout its existence, which affected its ability to carry out its mandate.¹¹⁹ This led to delays in the early stages of the tribunal's proceedings, as well as challenges in terms of conducting investigations

¹⁰⁹ Liolos, *supra* note 102, at 596; Bassiouni, *supra* note 23, at 42.

¹¹⁰ Kaufman, *supra* note 103, at 19; Liolos, *supra* note 102, at 596.

¹¹¹ Fairlie, *supra* note 4, at 313.

¹¹² Kaufman, *supra* note 103, at 19.

¹¹³ O'Donohue, *supra* note 5, at 270.

¹¹⁴ Bassiouni, *supra* note 23, at 42.

¹¹⁵ *Id.*

¹¹⁶ *Id.*; Cogan, *supra* note 62, at 410.

¹¹⁷ Ford 2015, *supra* note 28, at 14.

¹¹⁸ *Id.*

¹¹⁹ Bassiouni, *supra* note 23, at 43; Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L REV 1 (2014), at 3.

and gathering evidence.¹²⁰ In contrast, the ICC has a more stable funding structure, which has allowed it to conduct investigations and gather evidence more efficiently.¹²¹ However, the ICC has faced challenges in terms of cooperation from states, particularly those that are not parties to the Rome Statute, which has hindered its ability to gather evidence and carry out investigations.¹²²

The collection of evidence has been a challenge for both the courts, complicated by various of factors. The ICTY struggled with the destruction of evidence during the conflict in the former Yugoslavia, as well as the reluctance of witnesses to come forward and testify.¹²³ This led to delays and challenges in terms of gathering evidence and conducting investigations.¹²⁴ The ICC has faced similar hurdles in terms of gathering evidence, particularly in cases where states are unwilling to cooperate. Another common challenge is political interference, which has affected the tribunals' ability to operate effectively. The ICTY had to contend with political interference and pressure from various actors, including states, which affected its ability to carry out its mandate.¹²⁵ The tribunal also had to operate in a region that was still experiencing conflict and instability, which further complicated its work, similar to many of the ICC's cases.¹²⁶

B. How Does the Efficiency of the ICC Compare to that of the ICTR?

The ICTR was established by the United Nations Security Council in 1994 to prosecute individuals responsible for the 1994 genocide in Rwanda.¹²⁷ The genocide resulted in the deaths of an estimated 700,000 people, primarily ethnic Tutsis, over the course of 100 days.¹²⁸ Like the ICC, the ICTR faced a number of challenges and inefficiencies throughout its existence, including significant delays in its proceedings due in part to the large number of individuals to be prosecuted and the complex nature of the crimes committed during the genocide, as well as funding issues that limited hindered the tribunal's ability to conduct its work effectively.¹²⁹ The ICTR also faced challenges in gathering evidence and conducting investigations, particularly in situations where witnesses were hesitant to testify or were in remote areas and faced political interference.¹³⁰

Both the ICTR and the ICC have taken measures to improve efficiency and reduce delays in their proceedings. For example, the ICTR created several Chambers and Tribunals to handle different types of cases and made use of plea agreements and other mechanisms to encourage cooperation from accused individuals.¹³¹ The ICC has also introduced procedural reforms and made efforts to improve cooperation with national authorities.¹³²

¹²⁰ Cogan, *supra* note 62, at 410; Bassiouni, *supra* note 23, at 43-44; Ford, *supra* note 119, at 3.

¹²¹ Adamu, *supra* note 7, at 101.

¹²² *Id.*, at 102.

¹²³ Ford, *supra* note 28, at 19; Ljuboja, *supra* note 72, at 781.

¹²⁴ Ljuboja, *supra* note 72, at 781.

¹²⁵ Weiner, *supra* note 50, at 549.

¹²⁶ Gabrielè Chlevickatiè, Barbora Holá, Catrien Bijleveld, *Suspicious Minds? Empirical Analysis of Insider Witness Assessments at the ICTY, ICTR and ICC*, 20 EUROPEAN J OF CRIMINOLOGY 185 (2023), at 186.

¹²⁷ Bassiouni, *supra* note 23, at 43; Ljuboja, *supra* note 72, at 770.

¹²⁸ Lilian A. Barria, Steven D. Roper, *How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 THE INT J OF HUMAN RIGHTS 349 (2005), at 352.

¹²⁹ *Id.*, at 359; Ljuboja, *supra* note 72, at 768.

¹³⁰ Barria, Roper, *supra* note 128, at 361; Chlevickatiè, Holá, Bijleveld, *supra* note 130, at 186.

¹³¹ Ljuboja, *supra* note 72, at 770.

¹³² Leanos, *supra* note 39, at 2286.

V. How Can the ICC Improve Its Operations and Increase Efficiency?

The ICC has implemented several measures to improve efficiency, such as adopting a completion strategy, a case management system, outreach initiatives, and resource allocation.¹³³ Despite the measures taken by the ICC to improve efficiency, there is still room for improvement. Structural reforms, such as clarifying the ICC's jurisdiction, and mandate, increasing cooperation with national authorities, empowering the prosecutor's role, reforming the composition and structure of the ICC, and expanding the use of alternative dispute resolution mechanisms, are all potential areas for improvement.¹³⁴ Addressing these issues could help streamline its proceedings and reduce delays, ultimately leading to more efficient and effective justice.

Procedural reforms are another way to improve the efficiency of the ICC. Simplifying pre-trial proceedings, reducing the length and complexity of trials, improving witness protection, enhancing communication with victims, and increasing transparency are all potential areas for reform.¹³⁵ By implementing these measures, the ICC can accelerate the speed and efficiency of its proceedings while still maintaining the integrity of the criminal justice process.

Greater cooperation from member states can also have a significant impact on the efficiency of the ICC.¹³⁶ Facilitating the arrest and surrender of suspects, improving the quality and quantity of evidence, increasing the availability of resources, and reducing political interference are all potential ways in which member states can support the work of the ICC. By providing greater support to the ICC, member states can help to ensure that the ICC is able to operate independently and effectively, which can in turn lead to more efficient and effective justice.¹³⁷ This can include providing funding and resources to the ICC, promoting greater understanding and support for the ICC's work, and advocating for stronger cooperation and accountability among member states.¹³⁸ By working together, the international community can help strengthen the ICC's ability to deliver justice in a timely and efficient manner.¹³⁹

VI. Conclusion

Over the course of its existence, the ICC has faced significant delays in some of its most high-profile cases, and common themes suggest that there are systemic challenges to the ICC's ability to prosecute high-profile individuals accused of crimes against humanity. These challenges include difficulties in obtaining reliable evidence, political interference and resistance from member states, and a reliance on state parties to enforce arrest warrants and provide access to evidence and witnesses.¹⁴⁰ Overcoming these challenges would likely necessitate reforming the ICC's investigative and prosecutorial procedures, as well as

¹³³ O'Donohue, *supra* note 5, at 281.

¹³⁴ Zavala, *supra* note 3, at 486; Ibrahim, *supra* note 75, at 177; Bassiouni, *supra* note 23, at 45-46.

¹³⁵ Zavala, *supra* note 3, at 486; O'Donohue, *supra* note 5, at 286; Jones, *supra* note 40, at 18.

¹³⁶ Jones, *supra* note 40, at 16.

¹³⁷ Zavala, *supra* note 3 at 486; Ljuboja, *supra* note 72, at 804; Ibrahim, *supra* note 75, at 195.

¹³⁸ Barne, *supra* note 1, at 1618; Ibrahim, *supra* note 75, at 195; Jones, *supra* note 40, at 18.

¹³⁹ Bassiouni, *supra* note 23, at 44.

¹⁴⁰ Adamu, *supra* note 7, at 102; Jones, *supra* note 40, at 1.

bolstering cooperation and aid from member states. Furthermore, the ICC may need to adopt more stringent measures against member states that do not adequately contribute to its financial resources, in order to alleviate the financial strains that hinder the ICC's pursuit of justice. Additionally, strategies should be explored to minimize political interference and transcend cultural obstacles.

However, it is important to note that the delays observed in the three cases analyzed in this paper may not be indicative of the overall performance of the ICC. Other cases may have different factors contributing that were not accounted for in this research, which could result in longer or shorter delays. Moreover, cases with multiple defendants or crimes may require more resources and time to investigate and prosecute, thereby impacting the ICC's efficiency.

In order to comprehensively address the challenges faced by the ICC with regards to its efficiency, it is important to expand the scope of research beyond the identified themes in the paper. Other factors that may impact the Court's efficiency, such as the effectiveness of its internal management, the quality of its partnerships with other institutions and NGOs, and the availability of its resources, should be investigated further. Additionally, as delays have the potential to affect the Court's legitimacy and public perception, future research should place greater emphasis on studying the impact of delays on the ICC's reputation. This includes exploring how delays may affect the ICC's perceived fairness and impartiality and how this may influence the Court's ability to achieve its mission. It is also important to consider how global political developments and changing societal attitudes, especially in the post-COVID-19 era, may impact the ICC's effectiveness and efficiency. Ultimately, a comprehensive approach to research and analysis can inform better strategies by improving the ICC's efficiency and effectiveness in achieving its mandate.

