

AND JUSTICE FOR ALL?

**HOW THE RELATIONSHIP BETWEEN THE US AND THE ICC SINCE
2017 HAS AFFECTED THE LEGITIMACY OF THE ICC AND THE
CREDIBILITY OF THE US IN INTERNATIONAL CRIMINAL JUSTICE**

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2023

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ACKNOWLEDGEMENTS

First, I would like to express my sincere gratitude to all the staff at the Transitional Justice Institute.

In particular, I would like to thank Dr Anne Smith for supervising this thesis. Thank you for your guidance, reassurance, and expertise. You gave me the confidence to enjoy this rewarding experience.

I also wish to thank Dr Thomas Hansen, Professor Rory O’Connell, and Professor Cath Collins.

Dr Thomas Hansen and his work ignited my interest in international criminal justice. I also want to express my gratitude for his feedback and guidance during the early stages of the thesis writing process.

Professor Cath Collins’ passionate tutelage fostered my interest in the ICC and helped me to develop a deeper critical understanding.

I want to thank Professor Rory O’Connell for his knowledge and help with thesis writing and for helping me to conceptualise a way of contending with some of these issues.

I must also express my deep and sincere gratitude to the family of Liam Kelly for their tremendous assistance. I hope I have been able to honour his memory, in some way, with my commitment to this thesis.

ABSTRACT

The United States (US) has had a controversial relationship with the International Criminal Court (ICC) and international criminal justice (ICJ) more broadly. The period since 2017 highlights the issues. This thesis examines legitimacy theories to assist in considering the impact of controversial decisions and interactions. The US denies that the ICC can establish jurisdiction over US nationals without US ratification of the Rome Statute. Despite this, the US has supported ICC investigations into nationals of other non-party states when the investigations aligned with US interests. Creating a perception of double standards in ICJ may be damaging to the legitimacy of the ICC and ICJ more broadly. The US has vehemently opposed ICC scrutiny over alleged US or Israeli crimes since 2017, imposing economic sanctions on ICC staff. The US then supported ICC involvement in Ukraine to investigate alleged Russian crimes, despite Russia being a non-party state. The US denied legal jurisdiction over US and Israeli nationals as non-party states and seemed to support ICC jurisdiction over non-party states when this was in line with US national interests.

ICC actors should be cautious of being overly deferential towards the US; otherwise, the ICC's legitimacy may be weakened as the US demands impunity but ignores its own legal arguments on an ad hoc basis. The ICC's legitimacy is relevant to its effectiveness. An effective ICC could deter grave crimes and strengthen global accountability expectations. This thesis argues that the ICC's legitimacy is particularly sensitive to its actors appearing to act selectively. A perceived double standard that predates 2017 but is undoubtedly observable since 2017 has damaged US credibility in ICJ. The US must change its approach to regain this credibility. A scalar legitimacy assessment suggests that the ICC's sociological legitimacy has suffered due to US-ICC interactions since 2017.

ABBREVIATIONS AND ACRONYMS

ABA	American Bar Association
ACLU	American Civil Liberties Union
ASP	Assembly of States Parties
ASPA	American Service-Members' Protection Act
CCR	Center for Constitutional Rights
CIA	Central Intelligence Agency
EU	European Union
IBA	International Bar Association
ICC	International Criminal Court
ICJ	International criminal justice
IGO	Intergovernmental organisation
IMTFE	International Military Tribunal for the Far East
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
UN	United Nations
UNSC	United Nations Security Council
US	United States

NOTE ON ACCESS TO CONTENTS

‘I hereby declare that with effect from the date on which the dissertation is deposited in the Library of the University of Ulster I permit the Librarian of the University to allow the dissertation to be copied in whole or in part without reference to me on the understanding that such authority applies to the provision of single copies made for study purposes or for inclusion within the stock of another library. This restriction does not apply to the copying or publication of the title and abstract of the dissertation. IT IS A CONDITION OF USE OF THIS DISSERTATION THAT ANYONE WHO CONSULTS IT MUST RECOGNISE THAT THE COPYRIGHT RESTS WITH THE AUTHOR AND THAT NO QUOTATION FROM THE DISSERTATION AND NO INFORMATION DERIVED FROM IT MAY BE PUBLISHED UNLESS THE SOURCE IS PROPERLY ACKNOWLEDGED.’

CHAPTER 1: INTRODUCTION

1.1: Background and context

The United States (US) opposed creating an International Criminal Court (ICC) after the First World War.¹ US officials favoured prosecutions by the state of nationality of the accused or ‘the state of an opposing army’ (referring to the victorious powers in this context) or by ‘a tribunal combining national jurisdiction voluntarily creating a multinational military tribunal’.² In the aftermath of the Second World War, the Truman administration supported the creation of a multinational military tribunal to prosecute high-ranking Nazi war criminals.³ The US representatives advocated for genuine trials in response to Nazi war crimes.⁴ Despite issues raised concerning the Nuremberg Trials and the critique that the trials dispensed ‘victor’s justice’, the US had an influential role in strengthening the precedent that suspected war criminals should face trial.⁵ Elements in the British administration had favoured summarily executing some Nazi leaders and imprisoning others without trial; undoubtedly, between the choice of holding evidence-based trials and summary executions and imprisonment without trials, the US administration was correct.⁶ The US sought to show that grave crimes were unconscionable to the international community, favouring joint prosecutions by all the states involved in prosecuting to signify this message.⁷ However, significantly, the Allies of the Second World War exempted themselves from the jurisdiction of the International Military

¹ Mahmoud Cherif Bassiouni, ‘World War I: The War to End All Wars and the Birth of a Handicapped International Criminal Justice System’ (2002) 30 *Denv J Int’l L & Pol’y* 244, 254-273; Harry Rhea, ‘The United States and International Criminal Tribunals: An Historical Analysis’ (2009) 16 *ILSA J Int’l L* 19, 20; William Schabas, ‘International War Crimes Tribunals and the United States’ (2011) 35 *Diplomatic History* 769, 769; Harry Rhea, ‘International Criminal Courts Prior to the Second World War: An Historical Analysis of International and Multinational Criminal Courts Preceding Nuremberg’ (2019) 46 *Syracuse J Int’l L & Com* 323, 332-333.

² Bassiouni (n 1) 265-282; Rhea, ‘The United States and International Criminal Tribunals’ (n 1) 20; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 769-770; Rhea, ‘International Criminal Courts Prior to the Second World War’ (n 1) 327-333.

³ Rhea, ‘The United States and International Criminal Tribunals’ (n 1) 21-22; Leila Nadya Sadat, ‘The Nuremberg Paradox’ (2010) 58 *Am J Comp L* 151, 152-153; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 771-773; Rhea, ‘International Criminal Courts Prior to the Second World War’ (n 1) 327.

⁴ Robert H Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (London, 15 December 1947) 104-105 and 115; Rhea, ‘The United States and International Criminal Tribunals’ (n 1) 22; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 771-773.

⁵ Ian Cobain, ‘Britain Favoured Execution Over Nuremberg Trials for Nazi leaders’ *The Guardian* (26 October 2012) <www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders> accessed 08 October 2022.

⁶ *ibid.*

⁷ Michael P Scharf, ‘The Politics behind the U.S. Opposition to the International Criminal Court’ (1999) 5 *New Eng Int’l & Comp L Ann* 1, 1; Rhea, ‘The United States and International Criminal Tribunals’ (n 1) 22; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 771.

Tribunal at Nuremberg.⁸ The US also had a significant role in the formation of the International Military Tribunal for the Far East (IMTFE); however, US nationals were not subject to the jurisdiction of the IMTFE either.⁹

After the trials that followed the Second World War, the political climate during the Cold War led to a long period of inaction in international criminal justice (ICJ).¹⁰ This thesis follows Rodman's definition of ICJ; it 'is a field of international law that calls for the trial and punishment of those individuals who bear the greatest responsibility for the most serious war crimes and human rights abuses'.¹¹ US policy in the 1940s and 1950s made it clear that the US would oppose the jurisdiction of an ICC over US nationals without US consent.¹² This position endured.¹³

By the end of the Cold War, ICJ entered a period of significant developments.¹⁴ The US supported the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda during the 1990s.¹⁵ However, these tribunals' temporal and territorial jurisdictions were under United Nations Security Council (UNSC) control.¹⁶ In July 1998, the US was one of only seven states that voted against the adoption of the Rome Statute at the end of the Rome Conference on creating an ICC, with 120 voting in favour.¹⁷ The US

⁸ Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945 (London Agreement) art 3; Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 JICJ 830, 833; Rhea, 'The United States and International Criminal Tribunals' (n 1) 23.

⁹ International Military Tribunal for the Far East (Treaties and Other International Acts Series 1589, 19 January 1946) art 5; William A Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) 15 EJIL 701, 702-705; Rhea, 'The United States and International Criminal Tribunals' (n 1) 23.

¹⁰ Scharf (n 7) 1-2.

¹¹ Kenneth Rodman, 'International Criminal Justice' in Hugh LaFollette (ed), *The International Encyclopedia of Ethics* (Wiley 2019).

¹² Rhea, 'The United States and International Criminal Tribunals' (n 1) 24-30; Schabas, 'International War Crimes Tribunals and the United States' (n 1) 785.

¹³ Scharf (n 7) 6-7; Dawn Rothe and Christopher Mullins, 'The International Criminal Court and United States Opposition' (2006) 45 *Crime, Law and Social Change* 201, 206-208; Rhea, 'The United States and International Criminal Tribunals' (n 1) 24-30; Schabas, 'International War Crimes Tribunals and the United States' (n 1) 785.

¹⁴ Scharf (n 7) 1-2; Lynn Sellers Bickley, 'U. S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law' (2000) 14 *Emory Int'l L Rev* 213, 238-240.

¹⁵ Scharf (n 7) 3; Marc Lacey, 'Bush Links Aid to Yugoslavia to the Extradition of Milosevic' *The New York Times* (10 May 2001) <www.nytimes.com/2001/05/10/world/bush-links-aid-to-yugoslavia-to-the-extradition-of-milosevic.html> accessed 28 July 2022; David Forsythe, 'The United States and International Criminal Justice' (2002) 24 *Hum Rts Q* 974, 981; Rhea, 'The United States and International Criminal Tribunals' (n 1) 30-35; Schabas, 'International War Crimes Tribunals and the United States' (n 1) 774-777.

¹⁶ UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955; Scharf (n 7) 3.

¹⁷ Neil King, 'Nations Agree to Create Court to Try War Crimes, Despite U.S. Objections' *The Wall Street Journal* (20 July 1998) <www.wsj.com/articles/SB900698923129500?mod=Searchresults_pos6&page=4> accessed 06

called for greater UNSC control over the ICC and was dissatisfied with the concessions included in the final draft of the treaty.¹⁸

President Clinton oversaw the signing of the Rome Statute in 2000; however, Clinton raised concerns regarding ‘significant flaws’ within the Rome Statute and stated the intention to ‘influence’ the ICC from ‘within’.¹⁹ Clinton stated that ICC jurisdiction over US nationals should only follow US ratification of the Rome Statute.²⁰ Clinton decided not to ‘submit the treaty to the Senate for advice and consent’ and did not advise his successor to do so.²¹

President Bush ‘unsigned’ the treaty on the 6th of May 2002, later in 2002, signing the controversial American Service-Members’ Protection Act (ASPA) into law.²² ASPA authorised the US to use ‘all means necessary ... including force’ to secure the release of the US or its allies’ actors ‘being detained or imprisoned’ concerning an ICC investigation.²³ Critics quickly dubbed ASPA ‘the Hague Invasion Act’, and Dutch officials were left bewildered by the US legislating permission to use force to liberate suspects from a court based

September 2022; Scharf (n 7) 6; David J Scheffer, ‘The United States and the International Criminal Court’ (1999) 93 AJIL 12, 21; Rhea, ‘The United States and International Criminal Tribunals’ (n 1) 35-36; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 778.

¹⁸ Scharf (n 7) 5; Scheffer (n 17) 13-14; Rhea, ‘The United States and International Criminal Tribunals’ (n 1) 36-37; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 778-779.

¹⁹ 22 USC § 7421 (2002); William Clinton, ‘Statement on the Rome Treaty on the International Criminal Court’ Authenticated US Government Information (GPO) (31 December 2000) <www.govinfo.gov/content/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf> accessed 14 June 2022; BBC, ‘Clinton’s Statement on War Crimes Court’ (*BBC News*, 31 December 2000) <<http://news.bbc.co.uk/1/hi/1095580.stm>> accessed 06 September 2022; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 779-780; Oona Hathaway, ‘The U.S. Finally Sees the Point of the International Criminal Court’ *The Washington Post* (13 April 2022) <www.washingtonpost.com/outlook/2022/04/13/war-crimes-russia-ukraine-icc/> accessed 14 June 2022.

²⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention), arts 34-38; Clinton (n 19); Scharf (n 7) 6-8; Scheffer (n 17) 17-18; Hathaway (n 19).

²¹ Clinton (n 19); Scheffer (n 17) 18-19; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 779-780; Human Rights Watch, ‘Q&A: The International Criminal Court and the United States’ (*Human Rights Watch*, 02 September 2020) <www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#2> accessed 07 September 2022.

²² BBC, ‘US Renounces World Court Treaty’ (*BBC News*, 06 May 2002) <<http://news.bbc.co.uk/1/hi/1970312.stm>> accessed 09 September 2022; Human Rights Watch, ‘United States “Unsigned” Treaty on War Crimes Court’ (*Human Rights Watch*, 06 May 2002) <www.hrw.org/news/2002/05/06/united-states-unsigned-treaty-war-crimes-court> accessed 14 June 2022; Human Rights Watch, ‘U.S.: “Hague Invasion Act” Becomes Law’ (*Human Rights Watch*, 03 August 2002) <www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law> accessed 19 September 2022; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 780-781; Al Jazeera, ‘Full Text of John Bolton’s Speech to the Federalist Society’ (*Al Jazeera*, 10 September 2018) <www.aljazeera.com/news/2018/9/10/full-text-of-john-boltons-speech-to-the-federalist-society> accessed 14 June 2022; Hathaway (n 19).

²³ Human Rights Watch, ‘U.S.: “Hague Invasion Act” Becomes Law’ (n 22); Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 781; Al Jazeera, ‘Full Text of John Bolton’s Speech’ (n 22); Hathaway (n 19).

in the Netherlands, a North Atlantic Treaty Organization (NATO) ally.²⁴ ASPA also ‘prohibited U.S. military aid to countries that joined the ICC unless they were members of NATO, were a major non-NATO ally or had agreed not to surrender U.S. personnel to the Court’.²⁵ The US pressured ICC member states to sign ‘Article 98 agreements’.²⁶ Through these agreements, ICC state parties agreed not to hand over US nationals to the ICC without US consent.²⁷ Numerous states that signed Article 98 agreements with the US ‘received financial and military support from the United States’; the US made signing these agreements a condition for providing certain aid for some states.²⁸ US laws dating back to 1999, including ASPA, limit the US ability to assist the ICC.²⁹

The US likely favoured ICC involvement in Darfur; if this was something the US opposed, the US could have vetoed the UNSC referral, but they abstained.³⁰ The referral included provisions for ‘exclusive jurisdiction’ for non-party states other than Sudan over the crimes of their

²⁴ NPR, ‘Hague Invasion’ (NPR, (Audio file) 14 June 2002) <www.npr.org/templates/story/story.php?storyId=1144998> accessed 14 June 2022; Human Rights Watch, ‘U.S.: “Hague Invasion Act” Becomes Law’ (n 22); Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 781; Al Jazeera, ‘Full Text of John Bolton’s Speech’ (n 22); Hathaway (n 19); NATO, ‘The Netherlands and NATO’ (NATO) <www.nato.int/cps/en/natohq/declassified_162354.htm> accessed 14 June 2022.

²⁵ Human Rights Watch, ‘Eight Initiatives the Obama Administration Should Take on International Justice’ (Human Rights Watch, 02 March 2009) <www.hrw.org/news/2009/03/02/eight-initiatives-obama-administration-should-take-international-justice> accessed 20 September 2022; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 781; Hathaway (n 19).

²⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute), art 98; David A Tallman, ‘Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict’ (2004) 92 Geo LJ 1031, 1042-45; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 781-83; Hathaway (n 19); Georgetown Law Library, ‘Countries that have Signed Article 98 Agreements with the U.S.’ (Georgetown Law Library) <<https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099>> accessed 14 June 2022.

²⁷ Agreement between the Government of the United States of America and the Government of the State of Israel regarding the surrender of persons to the International Criminal Court (adopted 04 August 2002, entered into force 27 November 2003) <https://guides.ll.georgetown.edu/ld.php?content_id=38318109> accessed 14 June 2022; Agreement between the Government of the United States of America and the Government of the Republic of Rwanda regarding the surrender of persons to International Tribunals (adopted 04 March 2003, entered into force 11 July 2003) <https://guides.ll.georgetown.edu/ld.php?content_id=38318255> accessed 14 June 2022; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 781; Hathaway (n 19); Georgetown Law Library (n 26).

²⁸ Nicholas Kristof, ‘Schoolyard Bully Diplomacy’ *The New York Times* (16 October 2005) <www.nytimes.com/2005/10/16/opinion/schoolyard-bully-diplomacy.html> accessed 28 September 2022; Claire R Seelke, ‘Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America’ (Congressional Research Service, 22 March 2007) <<https://crsreports.congress.gov/product/pdf/RL/RL33337>> accessed 23 October 2022; Rhea, ‘The United States and International Criminal Tribunals’ (n 1) 36.

²⁹ Brett Wilkins, ‘US Limits on ICC Complicate Biden’s Aim to Aid Putin War Crimes Probe’ (Common Dreams, 11 April 2022) <www.commondreams.org/news/2022/04/11/us-limits-icc-complicate-bidens-aim-aid-putin-war-crimes-probe> accessed 05 October 2022; Hathaway (n 19).

³⁰ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; Rhea, ‘The United States and International Criminal Tribunals’ (n 1) 37; Schabas, ‘International War Crimes Tribunals and the United States’ (n 1) 782.

nationals.³¹ The US voted *for* the referral of Libya to the ICC.³² Again, non-party states' nationals other than Libyans were exempted from ICC jurisdiction.³³ The US insisted on including exemptions to prevent ICC jurisdiction over US nationals potentially involved in these situations.³⁴ Including sections in these referrals, attempting to exclude certain states' nationals from ICC jurisdiction was controversial. There is a dispute over whether these provisions are compatible with the Rome Statute.³⁵ There is cause for concern over their impact on certain principles of ICJ, including the principles of legality, universal jurisdiction, and equality before the law.³⁶ These provisions could damage the 'ICC's legitimacy, credibility, impartiality, and independence'.³⁷

US exceptionalism and the desire to protect US autonomy are observable.³⁸ The US pattern of selectively supporting accountability mechanisms whilst refusing to accept the jurisdiction of these mechanisms over their actors or allies' actors by any means may have damaged perceptions of the legitimacy of the ICC and ICJ. Therefore, US-ICC interactions may damage the ability of the ICC to promote accountability, fight impunity, and deter grave crimes. The ICC's own components' decisions and responses are also relevant to perceptions of its legitimacy. The US has been a leading nation in the development of ICJ historically. However, US policies may have significantly impacted the US credibility and integrity in ICJ.

1.2: Research questions

Main research question:

- Have US policies and actions towards the ICC, and US-ICC interactions, since the beginning of 2017 damaged perceptions of the ICC's legitimacy?

³¹ *ibid.*

³² UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

³³ *ibid.*

³⁴ Ryan Goodman, 'How "Similar" is US Exemption on Draft UNSC Referral of Syria to the ICC?' (*Just Security*, 9 May 2014) <www.justsecurity.org/10266/similar-exemption-draft-uns-c-referral-syria-icc/> accessed 24 October 2022.

³⁵ Gabriel M Lentner, 'The Role of the UN Security Council vis-à-vis the International Criminal Court – Resolution 1970 (2011) and its Challenges to International Criminal Justice' (2014) 14(2) *International and Comparative Law Review* 7, 9-15.

³⁶ *ibid* 9-20.

³⁷ *ibid* 23.

³⁸ Charles William Maynes, 'US Unilateralism and Its Dangers' (1999) 25 *Rev Int'l Stud* 515, 515-518; Forsythe (n 15) 976; Aaron Fichtelberg, 'Democratic Legitimacy and the International Criminal Court' (2006) 4 *JICJ* 765, 765; Rhea, 'The United States and International Criminal Tribunals' (n 1) 23; Schabas, 'International War Crimes Tribunals and the United States' (n 1) 785.

This thesis is also concerned with the sub-question:

- Has the US lost credibility in ICJ?

1.3: Significance of the study

The US is one of the world's largest economies and a permanent member of the UNSC, which has powers of referral and deferral under the Rome Statute and can refer situations in non-party states involving non-party states' nationals to the ICC.³⁹ The ICC could not generally establish jurisdiction over this category of perpetrator without a UNSC referral or the consent of the relevant state. As a permanent member of the UNSC, the US will generally have the power to veto referrals it wants to block. The US has used its influential position to encourage investigations at the ICC into alleged crimes implicating Russian, Libyan, and Sudanese nationals, all non-party states. Concurrently, it opposed ICC jurisdiction over alleged Israeli and US nationals' crimes without their consent as non-party states. The US has a disproportionate influence over the ICC and refuses to accept ICC jurisdiction over its nationals; this may damage perceptions of the legitimacy of the ICC. The status and role of the US on the world stage may make US hypocrisy in ICJ particularly deleterious to the ICC and ICJ more broadly.⁴⁰ This thesis will consider the impact of US policies and actions and interactions with the ICC since 2017 on perceptions of the ICC's legitimacy. The thesis is also concerned with the credibility of the US in ICJ.

1.4: Methodology and methods

The study was desk-based.⁴¹ The primary research method used was document analysis, rigorously examining, analysing, interpreting, and organising the contents of documents.⁴² Analysing documents from various sources alleviated bias, corroborated information, and

³⁹ Rome Statute, art 12(2), 13(b) and 16; ICC, 'Libya: Situation in Libya' (*ICC*) <www.icc-cpi.int/libya> accessed 02 July 2022; ICC, 'Darfur, Sudan: Situation in Darfur, Sudan' (*ICC*) <www.icc-cpi.int/darfur> accessed 02 July 2022; Justin Yang, 'The Evolution of International Criminal Justice – The Incorporation of Domestic Legal Pluralism in the Current Practices of the International Criminal Court' in Ronald Slye (ed), *The Nuremberg Principles in Non-Western Societies: A Reflection on their Universality, Legitimacy and Application* (International Nuremberg Principles Academy 2016) <www.nurembergacademy.org/fileadmin/media/pdf/publications/The_Nuremberg_Principles_in_Non-western_Societies.pdf> accessed 14 November 2021.

⁴⁰ Hathaway (n 19).

⁴¹ Glenn Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27, 27.

⁴² *ibid* 27-28.

permitted a reflective and reflexive approach.⁴³ The thesis considered decisions and statements of the ICC and US statements and actions towards the ICC to provide a comprehensive overview of US-ICC interactions over the relevant timeframe. A doctrinal analysis that developed an understanding of the relevant law was necessary.⁴⁴ The Rome Statute, relevant treaties, and US law were analysed.

Journal articles were particularly relevant when considering legitimacy theories; this required analysis of the work of various scholars from multiple disciplines. A framework for assessing the impact of US-ICC interactions since 2017 on perceptions of the ICC's legitimacy was delineated. This thesis analysed sources, including journal articles, blogs, websites, and newspaper articles, which allowed consideration of how stakeholders, including scholars, lawyers, non-governmental organisations (NGOs), journalists, states, citizens, and intergovernmental organisations (IGOs), responded to US-ICC interactions. Responses were analysed to evaluate the impact of US-ICC interactions on perceptions of the ICC's legitimacy and US credibility in ICJ.

This thesis was a multidisciplinary case study which permitted an in-depth analysis of the relationship and interactions examined.⁴⁵ The US is a significant and influential world power, a permanent member of the UNSC, and has not joined the Rome Statute. This case selection was 'intrinsically interesting'.⁴⁶ The thesis covered the timeframe from the beginning of 2017 until the present day. This timeframe corresponds with controversial interactions between the US and the ICC. Analysing a limited timeframe permitted a detailed analysis of the effects of interactions on legitimacy and credibility perceptions.

1.5: Structure of the study

Chapter one sets out the background and context of the issues, the questions that will guide the research, the reasons for conducting this study, and the study's parameters. Chapter two contains a literature review on theories of legitimacy in international institutions focussing on

⁴³ *ibid* 28.

⁴⁴ Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8-10.

⁴⁵ Martyn Denscombe, *The Good Research Guide: For Small-Scale Social Research Projects* (6th edn, McGraw-Hill Education 2017) 56.

⁴⁶ *ibid* 62.

the ICC. This chapter sets out a framework to assess the impact of US-ICC interactions since 2017 on perceptions of the legitimacy of the ICC.

Chapter three briefly outlines US policy and interactions with the ICC during the timeframe. This chapter is a timeline of events since 2017. The chapter is valuable as it sets out the developments before singling out key developments for analysis in chapter four. Getting a clear chronological overview of developments during the timeframe is necessary. This chapter will be primarily factual; however, when read in conjunction with the background and context information in chapter one, chapter three illustrates a consistently hypocritical US position. It is necessary to start with this context before conducting the scalar assessment, as this information permits an understanding of why US policy appears problematic. This timeline provides the foundation for assessing the effect of US-ICC interactions on ICC legitimacy perceptions and US credibility in ICJ in chapter four.

Chapter four analyses responses to key developments selected from the timeline in chapter three. Stakeholders' responses to these developments will be analysed and evaluated. A scalar legitimacy assessment will determine the effects of US-ICC interactions on perceptions of the ICC's legitimacy. Analysis of stakeholders' responses will also permit consideration of what stakeholders' responses suggest about the effects of US-ICC interactions and US policy more broadly on the credibility of the US in ICJ. Chapter five sets out the conclusions.

CHAPTER 2: LITERATURE REVIEW: LEGITIMACY THEORIES

Introduction

This chapter contains a literature review on theories of the legitimacy of international institutions focussing on the ICC. The chapter develops a framework to assess the impact of developments since 2017 on the ICC's legitimacy. First, this chapter outlines a definition of legitimacy. Second, the chapter considers the value of the concept of legitimacy in this context. The next section considers the complexity and malleability of the concept of legitimacy. Two broad categories of legitimacy are prevalent in the literature: sociological and normative legitimacy. The flexibility of the concept means that these two conceptions are pliable. Here, a broad conception of sociological legitimacy, which subsumes normative legitimacy, is utilised. Therefore, stakeholder perceptions of legitimacy are vital to the analysis. A subsection outlining the stakeholders whose perceptions are relevant to the sociological legitimacy of the ICC concludes this section.

The subsequent section addresses the subjectivity of the concept. This subjectivity further highlights the need for clearly defined analysis parameters; this section clarifies the parameters for this thesis about the subjects and object of this assessment. The penultimate section considers the impact of external forces on perceptions of the legitimacy of the ICC. The final section of the chapter outlines the notion of scalar legitimacy assessments.⁴⁷ Legitimacy assessments can be scalar or binary.⁴⁸ A binary assessment determines whether the institution is legitimate or illegitimate.⁴⁹ Scalar assessments permit analysis of whether the institution's legitimacy has improved or weakened.⁵⁰ This notion can permit analysis of the effects of US-ICC interactions since 2017 on ICC stakeholders' legitimacy perceptions. Then, a brief conclusion summarises this chapter and connects it to the following chapters.

⁴⁷ Allen Buchanan, 'The Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court' (2019) 33 *Temp Int'l & Comp LJ* 323, 330-331.

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid.*

2.1: Broad definition of legitimacy

The concept of legitimacy is criticised for being ill-defined, abstract, and malleable.⁵¹ However, there is a commonly shared, broad definition in the literature when considering the legitimacy of governance institutions. Legitimacy, in this context, is often equated to the institution's 'right to rule' or justification for the institution's authority.⁵² Generally, a legitimate institution would have the right to rule and be justified in exercising its authority.

2.2: The value of legitimacy as a concept?

Legitimacy can provide scope for critical analysis and debate, which may improve our understanding of the functioning and effectiveness of international institutions.⁵³ The ICC relies on external institutions/actors to fulfil its functions and has limited coercive power. Because of this general lack of coercive power, with coercive power monopolised by states, legitimacy is particularly significant to how the ICC secures compliance. According to Takemura, utilising the concept of legitimacy to analyse the ICC may help to 'enhance the credibility and the authority of the ICC and eventually strengthen the functioning of [the] international system.'⁵⁴ This view is optimistic, but it is also logical. In time, improving the ICC's legitimacy may encourage non-party states to ratify the Rome Statute and could strengthen ICJ.⁵⁵ Therefore, the ICC must identify and tackle any issues leading to the most common legitimacy criticisms, as perceptions of legitimacy are relevant to the 'effectiveness' of the institution.⁵⁶ The ICC's *effectiveness* for these purposes is the ability to promote accountability and fight impunity for crimes in situations the ICC is involved.

⁵¹ Hitomi Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) 4(2) Amsterdam Law Forum 3, 5.

⁵² Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 AJIL 596, 601; Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics & International Affairs 405, 412; Takemura (n 51) 5; NP Adams, 'Institutional Legitimacy' (2018) 26 The Journal of Political Philosophy 84, 89.

⁵³ Asad Kiyani, 'The Antinomies of Legitimacy: On the (Im)possibility of a Legitimate International Criminal Court' (2015) 8 African Journal of Legal Studies 1, 3; Margaret deGuzman and Timothy Kelly, 'The International Criminal Court Is Legitimate Enough to Deserve Support' (2019) 33 Temp Int'l & Comp LJ 397, 399.

⁵⁴ Takemura (n 51) 15.

⁵⁵ *ibid* 4.

⁵⁶ David Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 AJIL 552, 561; Buchanan and Keohane (n 52) 407.

‘[A]n effective international order’ could check states’ use of power.⁵⁷ Some international institutions, including the ICC, understand that perceptions of ‘their legitimacy affects their power and effectiveness’.⁵⁸ The ICC has taken steps to strengthen perceptions of its legitimacy to bolster compliance.⁵⁹ Conversely, the ICC’s opponents have attempted to damage the ICC’s legitimacy to weaken the institution.⁶⁰ The importance placed on the legitimacy of the ICC by its supporters and opponents highlights the significance of legitimacy for international institutions and the potential practical benefits of improving the legitimacy of the ICC.⁶¹

2.3: The complexity and malleability of legitimacy as a concept

2.3.1: Categories of legitimacy

It is crucial at this stage to consider the complexity and flexibility of legitimacy in greater detail. A common theme in the literature is the division of legitimacy into two broad categories: normative legitimacy and sociological/popular legitimacy.⁶² These categories can be difficult to delineate.⁶³ This review will look at normative and sociological legitimacy in the context of the ICC more closely next.

2.3.1.1: Normative legitimacy

Normative legitimacy is framed here as when some objective assessment justifies authority.⁶⁴ Concerning the ICC, normative legitimacy has been viewed as relating to procedural fairness, respecting the ICC’s rules and procedures, promoting and respecting the rule of law and equality before the law, and respect for due process.⁶⁵ These notions are relevant for the legitimacy of any court. However, it is necessary to remember the specificities of the ICC that

⁵⁷ Ian Hurd, ‘Legitimacy and Authority in International Politics’ (1999) 53 *Int’l Org* 379, 382; Buchanan and Keohane (n 52) 434; Ronald Dworkin, ‘A New Philosophy for International Law’ (2013) 41 *Philosophy & Public Affairs* 2, 17.

⁵⁸ Hurd, ‘Legitimacy and Authority in International Politics’ (n 57) 401.

⁵⁹ *ibid* 383.

⁶⁰ *ibid*.

⁶¹ *ibid*.

⁶² Bodansky (n 52) 601; Allison M Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *AJIL* 510, 536; Buchanan and Keohane (n 52) 407; Takemura (n 51) 6.

⁶³ Danner (n 62) 536; Christopher A Thomas, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34 *OJLS* 729, 753.

⁶⁴ Bodansky (n 52) 601; Danner (n 62) 536.

⁶⁵ Takemura (n 51) 8.

distinguish it from domestic criminal courts.⁶⁶ The ICC's jurisdiction is generally limited to state parties' territory and nationals. The ICC relies on external actors to fulfil its mandate and lacks enforcement powers.⁶⁷

Nevertheless, the ICC's impartiality has been frequently criticised.⁶⁸ Sometimes decisions are labelled biased; however, decisions have been affected by multiple factors, including practical realities and pragmatism.⁶⁹ There are examples of the ICC attempting to affirm its ability to investigate and prosecute all sides involved.⁷⁰ For example, Prosecutor Ocampo signalled the intention to investigate and prosecute *all* alleged crimes, not just Lord's Resistance Army crimes, in Uganda and reiterated the ICC's impartiality.⁷¹ While there may be an argument over whether the ICC is legitimate under some objective assessment undefined here, here, the focus will be on how the legitimacy of the ICC has been affected by US-ICC interactions. It is helpful to consider sociological legitimacy in the context of the ICC next.

2.3.1.2: Sociological legitimacy

While perceptions can be relevant when analysing normative legitimacy, sociological legitimacy depends on stakeholder perceptions.⁷² Perceptions of an institution's legitimacy are relevant for compliance.⁷³ Popular legitimacy can provide a 'basis of effectiveness'.⁷⁴ Stakeholder perceptions are particularly significant for the ICC since it is limited in terms of power, relying on external forces for cooperation and support in fulfilling its functions.⁷⁵

⁶⁶ Takemura (n 51) 8; Antonio Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25 LJIL 491, 495-501; Buchanan (n 47) 326-333; Alain Zysset, 'Response to Allen Buchanan's the Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court, Manuscript, 2019' (2019) 33 Temp Int'l & Comp LJ 392, 393-395; deGuzman and Kelly (n 53) 398.

⁶⁷ deGuzman and Kelly (n 53) 400.

⁶⁸ Buchanan and Keohane (n 52) 425; Takemura (n 51) 9-10; Marieke de Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017) 17 Int CLR 591, 593.

⁶⁹ deGuzman and Kelly (n 53) 400.

⁷⁰ *ibid.*

⁷¹ ICC-OTP, 'Statement by Chief Prosecutor Luis Moreno-Ocampo' (ICC, 14 October 2005) <www.icc-cpi.int/sites/default/files/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf> accessed 04 July 2022; deGuzman and Kelly (n 53) 400.

⁷² Hurd, 'Legitimacy and Authority in International Politics' (n 57) 381; Thomas (n 63) 741.

⁷³ Hurd, 'Legitimacy and Authority in International Politics' (n 57) 381; Takemura (n 51) 7.

⁷⁴ Bodansky (n 52) 603.

⁷⁵ Bodansky (n 52) 603; Takemura (n 51) 6.

The ICC cannot hold actors from some of the world's most powerful states, including the US, accountable because of its limited jurisdiction and power despite these great powers' disproportionate power and influence in global politics. This double standard can negatively affect perceptions of the ICC's ability to respect the rule of law, particularly the associated notion of equality before the law. *Equality before the law* here means applying the law equitably to all regardless of distinctions, such as nationality or rank; it is closely associated with the notion of fairness. States have denied jurisdiction over their nationals even where the territorial requirement in the Rome Statute would permit the ICC to exercise jurisdiction. When certain nations' nationals are excluded from an investigation by a UNSC referral or when a state refuses to cooperate, perceptions of equality before the law at the ICC may be damaged. This phenomenon is evident in the ICC investigations in Libya, Darfur, and Afghanistan, for example. This phenomenon is damaging to stakeholders' legitimacy perceptions of the ICC. Sociological legitimacy, as framed here, requires consideration of concepts, including morality, impartiality, the rule of law, and equality before the law.⁷⁶ Here, a broad conception of sociological legitimacy, which considers notions often deemed relevant for an assessment of the normative legitimacy of the ICC, may be beneficial to the question of the impact of the US-ICC relationship since 2017 on perceptions of the ICC's legitimacy. The lines between normative and sociological legitimacy are becoming blurred; this is addressed further in the following section.

2.3.2: Delineating the conception utilised here

It is possible to frame legitimacy analysis so that the broader category of sociological legitimacy subsumes normative legitimacy.⁷⁷ Takemura explains this by stating normative 'legitimacy could be incorporated into sociological legitimacy since the due process of an international criminal tribunal may be one factor of sociological legitimacy'.⁷⁸ This thesis will utilise a context-specific and broad conception of legitimacy. For these purposes, sociological legitimacy subsumes normative legitimacy. This thesis considers changes to the ICC's legitimacy by analysing stakeholder perceptions.

⁷⁶ Takemura (n 51) 5.

⁷⁷ *ibid* 13.

⁷⁸ *ibid*.

2.3.3: Sociological legitimacy: Who are the stakeholders?

Sociological legitimacy concerns perceptions of the institution among stakeholders.⁷⁹ Therefore, it is necessary to identify ICC stakeholders.⁸⁰ Takemura contends that individuals can be stakeholders; this is logical.⁸¹ The ICC's website displays a quote by Kofi Annan, former United Nations (UN) Secretary-General, stating simply, '[t]his cause ... is the cause of all humanity'.⁸² It seems reasonable to categorise all the individuals that constitute humanity as stakeholders in the ICC. The ICC may play a part in shaping ICJ in the future; state borders of non-party states are not an impenetrable barrier to this influence, at least not necessarily.⁸³ Therefore, it is logical to see the entirety of humanity as ICC stakeholders, subjects whose perceptions are relevant to the sociological legitimacy of the ICC as the object of analysis.

2.4: Legitimacy: 'Semantic ambiguity' and subjectivity

The use of legitimacy theories is often critiqued for 'semantic ambiguity'.⁸⁴ Legitimacy theories are subjective.⁸⁵ Legitimacy assessments are reliant on subjective theories.⁸⁶ Kiyani contends it is 'impossible' to develop objective 'common standards' of legitimacy.⁸⁷ For Kiyani, legitimacy 'is a subjective quality, relational between actor and institution, and is defined by the actor's *perception* of the institution'.⁸⁸ If we accept that all humanity are stakeholders in the ICC and consider the various roles the ICC's components fulfil and the influence of external powers over how the ICC fulfils its roles, Kiyani's analysis on the complexity and indeterminacy of the concept of legitimacy is logical.⁸⁹ The ICC has numerous functions and constituent parts, the legitimacy of which may be assessed by different criteria and 'by a variety of audiences'.⁹⁰ Perceptions of the legitimacy of the ICC are ultimately subjective and can vary wildly across states, regions, and within them.⁹¹

⁷⁹ Bodansky (n 52) 601; Takemura (n 51) 6.

⁸⁰ Takemura (n 51) 6.

⁸¹ *ibid.*

⁸² ICC, 'About the Court' (ICC) <www.icc-cpi.int/about/the-court> accessed 18 August 2022.

⁸³ Takemura (n 51) 6.

⁸⁴ Caron (n 56) 557; Thomas (n 63) 731-732.

⁸⁵ Buchanan (n 47) 330.

⁸⁶ *ibid.*

⁸⁷ Kiyani (n 53) 2-3.

⁸⁸ *ibid.* 6, citing Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007) 7.

⁸⁹ Kiyani (n 53) 10-21.

⁹⁰ Kiyani (n 53) 10-25; Buchanan (n 47) 330.

⁹¹ Takemura (n 51) 13-14; Thomas (n 63) 748-749; Kiyani (n 53) 32.

2.4.2: Epistemological and methodological uncertainty and the need for clearly delineating the parameters of the analysis

There is much uncertainty when applying legitimacy criteria to a broad assessment of an international institution.⁹² There is a multitude of ‘potentially conflicting criteria’ and no sufficient ‘guidance for how to weight a plurality of criteria when an institution scores high on some and low on others.’⁹³ Legitimacy assessments will vary depending on the object of the analysis, ‘when legitimacy is applied to actions, norms, actors and systems ... the legitimacy of each of these object types can be treated separately, even in the same factual context’.⁹⁴ There may be uncertainty about the potential legitimacy criteria and how the object of the assessment is delineated. Developing a context-specific conception of legitimacy may help address these problems.

While legitimacy has value in this context as a concept, it brings methodological and epistemological questions.⁹⁵ Buchanan views current theories of legitimacy as ‘incomplete’ tools for making legitimacy assessments and concludes by questioning the value of assessments of international institutions based on notions of legitimacy.⁹⁶ The analysis here agrees with Adams’ assessment that ‘we should abandon the idea of a single standard of political legitimacy’.⁹⁷ However, the concept of legitimacy can still be beneficial, even where this brings methodological and epistemological uncertainty. The boundaries of any legitimacy assessment should be defined.⁹⁸ It is ‘important’ to delineate the object of the assessment.⁹⁹ The object here is the ICC as a legal institution in a broad sense, including its various roles and component organs. It is also beneficial to outline the subjects of the analysis; in this context, this requires delineation of the relevant stakeholders; here, all individuals that constitute humanity are considered ICC stakeholders. Under this framework, evidence of any stakeholders’ perceptions can be relevant.

⁹² Buchanan (n 47) 330.

⁹³ *ibid.*

⁹⁴ Thomas (n 63) 746.

⁹⁵ Caron (n 56) 557; deGuzman and Kelly (n 53) 398-403.

⁹⁶ Buchanan (n 47) 338-339.

⁹⁷ Adams (n 52) 94.

⁹⁸ Buchanan (n 47) 338.

⁹⁹ Thomas (n 63) 746.

2.5: External forces impact the ICC's legitimacy

The ICC relies on various external actors and institutions to function, including states (particularly state parties), their political organisations and investigative teams, IGOs (the UNSC in particular), and NGOs.¹⁰⁰ This analysis considers several organs within the ICC, and its various roles, how external actors interact with the ICC, and how internal and external forces affect perceptions of the ICC's legitimacy.¹⁰¹ While, as discussed, this brings epistemological and methodological limitations by, for example, failing to separate the parts of the institution, it could provide scope to examine the institution holistically.¹⁰² A broad assessment considers the institution in a way that reflects broad US policies.¹⁰³ The US attempted to influence the ICC by sanctioning the ICC's actors, lobbying state parties to enter bilateral agreements, and wielding its powers in the UNSC to ensure its interests were well protected.¹⁰⁴ The US has lobbied for exclusive jurisdiction over its nationals when acting on behalf of the UN.¹⁰⁵ These clauses in the UNSC's referrals to the ICC create a double standard where the ICC may be limited to investigating crimes of specific actors in some situations meaning some crimes in a situation may be exempted from ICC jurisdiction by the UNSC based on the nationality of a suspect.¹⁰⁶ US policies and actions may damage perceptions of the ICC's impartiality, affecting stakeholders' legitimacy perceptions.

The ICC does not have the authority to address issues of non-ratification or the UNSC's role under the Rome Statute and the broader need for UNSC reform.¹⁰⁷ These are issues stemming from within the international system that created the ICC.¹⁰⁸ Realpolitik impacts the ICC's work.¹⁰⁹ Issues in the broader international legal system cannot necessarily be attributed directly to the ICC, which cannot address many of these perceived problems.¹¹⁰ The ICC can still provide functions, even allowing for these practical political considerations.¹¹¹ However, crucially, issues with the broader international legal system are relevant to stakeholders'

¹⁰⁰ de Hoon (n 68) 594; Buchanan (n 47) 336.

¹⁰¹ Buchanan (n 47) 336.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970; Goodman (n 34).

¹⁰⁶ *ibid.*

¹⁰⁷ Buchanan (n 47) 337.

¹⁰⁸ *ibid.*

¹⁰⁹ deGuzman and Kelly (n 53) 403.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

perceptions of the legitimacy of the ICC.¹¹² External actors and institutions can impact stakeholder perceptions of the ICC's legitimacy just as internal components/actors can.

2.6: The scalar legitimacy assessment

Allen Buchanan's scalar legitimacy assessments can assess whether an institution is becoming (or has become) 'more or less' legitimate.¹¹³ A scalar legitimacy assessment can permit analysis of whether the ICC has become more or less legitimate in the eyes of its stakeholders. This form of legitimacy assessment can permit analysis of the ICC's interactions with the US during the relevant timeframe and reactions to those interactions to gauge how US-ICC interactions since the beginning of the Trump administration affected stakeholder perceptions of the legitimacy of the ICC. Given the broad categorisation of the stakeholder class, any perceptions may be relevant. While this is a subjective methodology for analysing an institution's legitimacy, it is also a novel method for examining some of the ICC's most significant legitimacy issues. In particular, the criticism that the ICC may be incapable of exemplifying notions of fairness and equality before the law because its jurisdiction is limited, in general terms, to state parties' territory and their nationals and the disproportionate power and influence over the ICC by powerful non-party states. A scalar assessment considering the specific impact of US policies and actions towards the ICC and US-ICC interactions since the beginning of the Trump administration on perceptions of the legitimacy of the ICC will be included in chapter four and is the primary enquiry of this thesis.

Conclusion

Broadly, legitimacy is viewed here as the right to rule or the justification of the authority of the relevant institution. The concept of legitimacy is malleable, a preminent criticism against applying the concept. However, legitimacy has value when considering the ICC; legitimacy can provide scope for epistemological and practical benefits for international governance, which could be important for promoting global expectations for accountability in the future. The main categories in the literature are normative and sociological legitimacy; the legitimacy conception applied here is sociological in a broad context-specific conception that subsumes normative legitimacy and focuses on stakeholder perceptions. Popular perceptions of

¹¹² *ibid* 404.

¹¹³ Bodansky (n 52) 623; Takemura (n 51) 4; Thomas (n 63) 738; Buchanan (n 47) 330-331.

legitimacy are relevant to the institution's effectiveness, particularly for the ICC, because it depends on external forces to function. Improved legitimacy could bolster this external support. It must also be understood and is a motivating factor for this thesis that external forces can affect perceptions of the ICC. Stakeholders in the ICC here are humanity en masse. The complexity and subjectivity of legitimacy and the complexity of the various functions of the ICC mean it is beneficial to delineate the parameters of the analysis. This complexity also brings methodological and epistemological questions. Delineating the parameters of analysis and taking the specificities of the context into account may help alleviate uncertainties. The thesis will broadly analyse perceptions of the legitimacy of the ICC, and analysis is open to considering all stages of the ICC's processes, including, when relevant, preliminary examinations, the opening of investigations, decisions of organs and actors of the ICC, prosecutorial and investigative strategy, judgments, and enforcement of decisions. This framework can provide scope for considering the impact of US-ICC interactions since 2017 on stakeholders' legitimacy perceptions of the ICC holistically. This thesis will implement a scalar legitimacy assessment to evaluate whether its stakeholders perceive the ICC as more or less legitimate due to US-ICC interactions. First, chapter three will set out a timeline of interactions, policies, actions, and decisions of ICC organs and personnel and those of the relevant US leaders to understand what happened. Then chapter four will analyse how key developments affected stakeholders' legitimacy perceptions of the ICC and evaluate what responses suggest for the US credibility in ICJ.

CHAPTER 3: US-ICC INTERACTIONS SINCE 2017 – A TIMELINE

Introduction

This chapter outlines a timeline covering the period since 2017 and includes relevant contextual information so key developments can be selected and analysed in chapter four. Although the timeline is simply factual, a clear understanding of what occurred during the timeframe permits a focus on the scalar assessment in the next chapter and an informed, in-depth analysis of what stakeholders' responses suggest the developments mean for the ICC's sociological legitimacy and US credibility in ICJ.

US-ICC interactions since 2017 have further exposed issues with US policy on ICJ and US-ICC interactions. Demonstrating that the US has a consistently hypocritical position is essential for understanding why US-ICC interactions during the timeframe are significant for the ICC's legitimacy and the US credibility in ICJ. This chapter has six sections. The first section looks at the ICC inquiries into the Afghanistan situation and the Prosecutor's request for authorisation to open an investigation in 2017. The second section outlines the Trump administration's response in 2018 to ICC involvement in situations that may implicate US or US allies' actors. Then, the third section looks at the events of 2019, and the fourth section outlines key moments throughout 2020. The penultimate section sets out the approach of the Biden administration in 2021. The new administration softened the approach to the ICC and repealed the Trump-era sanctions. This section also sets out the approach of the new ICC Prosecutor, Karim Khan, towards the Afghanistan investigation, as communicated in September 2021. The final section briefly considers US support for ICC involvement in Ukraine. Then there is a summary and a consideration of the questions raised by the events in the timeline. These questions are examined in the scalar assessment in chapter four.

3.1: The preliminary examination into the Afghanistan situation and the Prosecutor's request to open an investigation

The Office of the Prosecutor (OTP) began the preliminary examination of the situation in Afghanistan in 2006.¹¹⁴ By 2013, the Prosecutor's evidence-gathering process had led to 'a

¹¹⁴ *The Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation) ICC-02/17-33 (12 April 2019), para 44; Office of the Prosecutor, 'Report on Preliminary Examination Activities 2011' (*ICC-OTP*, 13 December 2011) <www.icc-cpi.int/sites/default/files/NR/rdonlyres/63682F4E-49C8-445D-8C13-

determination that there was a reasonable basis to believe that crimes against humanity and war crimes had been committed'.¹¹⁵ Then, in December 2014, the Senate Select Committee on Intelligence's Report on the Central Intelligence Agency's (CIA) detention and interrogation program was published.¹¹⁶ This report relayed 'significant' information on the CIA's interrogation methods.¹¹⁷ On the 20th of November 2017, the ICC Prosecutor submitted a request for authorisation to investigate alleged crimes related to the armed conflict in Afghanistan.¹¹⁸ The ICC Prosecutor contended in her request that the preliminary examination into the situation in Afghanistan faced several challenges, including 'limited or reluctant cooperation from many stakeholders'.¹¹⁹ Despite these limitations, the Prosecutor put forward that there was a reasonable basis to believe that crimes under the ICC's jurisdiction had been committed in Afghanistan.¹²⁰ The Prosecutor put forward three groups alleged to be responsible for the relevant crimes in the Afghanistan situation.¹²¹ These three categories are the Taliban and other armed groups, the Afghan Forces, and US Forces and the CIA.¹²² The subsequent development outlines the US response to these activities.

3.2: 2018: The Trump administration's response to the Prosecutor's request for authorisation to open an investigation into the situation in Afghanistan

In March 2018, Trump appointed John Bolton as National Security Adviser.¹²³ Shortly after that, Mike Pompeo, former CIA Director, assumed the role of Secretary of State.¹²⁴ US interactions with the ICC from this point to the end of the Trump administration were outwardly hostile towards the ICC and openly aimed to prevent the ICC from investigating alleged US

F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf> accessed 04 October 2022, para 20; Lloyd T Chigowe, 'The ICC and the Situation in Afghanistan: A Critical Examination of the role of the Pre-Trial Chambers in the Initiation of Investigations *Proprio Motu*' (2022) 35 LJIL 699, 700.

¹¹⁵ *The Situation in the Islamic Republic of Afghanistan* (Public Redacted Version of "Request for Authorisation of an Investigation Pursuant to Article 15") ICC-02/17-7-Conf-Exp (20 November 2017), para 25.

¹¹⁶ *ibid*; Senate Select Committee on Intelligence, 'Committee Study of the Central Intelligence Agency's Detention and Interrogation Program', (Declassification Revisions 3 December 2014) <www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf> accessed 04 October 2022.

¹¹⁷ *ibid*.

¹¹⁸ ICC-02/17-33 (n 114), para 5; ICC, 'Afghanistan: Situation in the Islamic Republic of Afghanistan' (*ICC*) <www.icc-cpi.int/afghanistan> accessed 14 June 2022.

¹¹⁹ ICC-02/17-7-Conf-Exp (n 115), para 24.

¹²⁰ *ibid*, para 25; ICC-02/17-33 (n 114), para 15.

¹²¹ ICC-02/17-33 (n 114), para 17.

¹²² *ibid*, paras 18-26.

¹²³ BBC, 'Trump Replaces National Security Adviser HR McMaster with John Bolton' (*BBC*, 23 March 2018) <www.bbc.co.uk/news/world-us-canada-43509695> accessed 04 October 2022.

¹²⁴ *ibid*; BBC, 'EX-CIA Chief Mike Pompeo Confirmed as Secretary of State' (*BBC*, 26 April 2018) <www.bbc.co.uk/news/world-us-canada-43910164> accessed 04 October 2022.

nationals' crimes in connection with the Afghanistan conflict.¹²⁵ The leading public voices of this response were Bolton and Pompeo.¹²⁶

Bolton, a 'conservative firebrand', is a hawkish Republican figure.¹²⁷ Bolton's speech on the 10th of September 2018 to the Federalist Society responded to the ICC Prosecutor's request to investigate alleged crimes relating to the Afghanistan conflict and set out US policy for the ICC under the Trump administration.¹²⁸ He labelled the ICC 'dangerous' and framed the ICC as a threat to the US Constitution and sovereignty.¹²⁹ He invoked patriotic language in his attack on this 'illegitimate' Court and defence of US military and intelligence personnel.¹³⁰ Bolton reaffirmed what ASPA had initially enshrined, that the US would use 'any means necessary' to prevent the ICC from prosecuting US citizens.¹³¹ Bolton believed that "the righteous might" of the US and its allies' is 'the only deterrent to evil and atrocity'.¹³² He framed the ICC as a severe threat to his envisioned US morality lead world order.¹³³ Bolton also made it clear that the US stood shoulder to shoulder with its ally Israel and criticised the ICC for considering an investigation into alleged crimes in Palestine.¹³⁴ Bolton concluded by setting out measures the US had in place or would implement to deter the ICC from prosecuting US or allies' personnel.¹³⁵ These measures included sanctioning ICC officials, and he threatened the US would consider other states' cooperation with the ICC when considering 'foreign assistance, military assistance, and intelligence sharing levels'.¹³⁶

¹²⁵ Thomas Obel Hansen, 'The Role of Great Powers Within the Court' (Conference paper for the 'International Criminal Court in Crisis?' Conference, The Danish Foreign Policy Society & University of Southern Denmark, Århus, Denmark, 27-28 February 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3546847> accessed 14 June 2022.

¹²⁶ *ibid.*

¹²⁷ Greg Jaffe and Josh Dawsey, 'Trump Names Former Ambassador John Bolton as his New National Security Adviser' *The Washington Post* (22 March 2018) <www.washingtonpost.com/world/national-security/trump-names-former-ambassador-john-bolton-as-his-new-national-security-adviser/2018/03/22/aa1d19e6-2e20-11e8-8ad6-fbc50284fce8_story.html> accessed 04 October 2022; Manal Jaffery, 'Bolton Admits to Planning Attempted Foreign Coups, Following Imran's 'Regime Change' Claims' *Pakistan Today* (13 July 2022) <www.pakistantoday.com.pk/2022/07/13/bolton-admits-to-planning-attempted-foreign-coups-following-imrans-regime-change-claims/> accessed 04 October 2022.

¹²⁸ Al Jazeera, 'Full Text of John Bolton's Speech' (n 22).

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ *ibid.*

On the 12th of September 2018, the ICC responded to John Bolton’s speech to the Federalist Society.¹³⁷ The ICC reaffirmed its independence and impartiality, stating that its subsidiary role places ‘primary jurisdiction’ on states.¹³⁸ The statement concluded that the ICC would continue fulfilling its mandate ‘undeterred’.¹³⁹ President Trump’s speech to the United Nations General Assembly on the 25th of September 2018 echoed Bolton in framing the ICC as a threat to US sovereignty.¹⁴⁰ Trump stated, ‘[a]s far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority’.¹⁴¹ Both Trump and Bolton denied the ICC’s legitimacy, at least for US nationals. The subsequent section sets out further US steps and the controversial decision and reasoning of Pre-Trial Chamber (PTC) II to deny the Prosecutor’s request.

3.3: 2019: continuing US pressure and the PTC II decision of the 12th of April 2019

On the 15th of March 2019, Secretary of State Pompeo announced the US would revoke or deny visas to ICC staff ‘involved in investigating the actions of US troops’.¹⁴² Pompeo also threatened further measures, including economic sanctions, where the ICC to proceed with investigations into alleged crimes of US or allies actors.¹⁴³ These responses made it clear that the Trump administration intended to openly and vehemently oppose ICC investigations into US or US allies’ nationals’ alleged crimes.¹⁴⁴ Pompeo openly stated that US measures were attempts to coerce the ICC to drop any inquiries into US and allies’ personnel’s alleged crimes.¹⁴⁵ Then, in early April 2019, the administration followed through on Secretary

¹³⁷ ICC, ‘The ICC Will Continue its Independent and Impartial Work, Undeterred’ (*ICC*, 12 September 2018) <www.icc-cpi.int/news/icc-will-continue-its-independent-and-impartial-work-undeterred> accessed 16 June 2022.

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ UN Affairs, ‘US President Trump Rejects Globalism in Speech to UN General Assembly’s Annual Debate’ (*UN News*, 25 September 2018) <<https://news.un.org/en/story/2018/09/1020472>> accessed 04 October 2022.

¹⁴¹ *ibid.*

¹⁴² ‘US to Deny Visas for ICC Members Investigating Alleged War Crimes’ *The Guardian* (15 March 2019) <www.theguardian.com/us-news/2019/mar/15/mike-pompeo-us-war-crimes-investigation-international-criminal-court> accessed 14 June 2022; Dan De Luce and Abigail Williams, ‘Trump Admin to Ban Entry of International Criminal Court Investigators’ (*NBC News*, 15 March 2019) <www.nbcnews.com/politics/white-house/trump-admin-ban-entry-international-criminal-court-investigators-n983766> accessed 14 June 2022.

¹⁴³ *ibid.*

¹⁴⁴ Hansen (n 125).

¹⁴⁵ De Luce and Williams (n 142).

Pompeo's announcement and revoked the visa of Prosecutor Bensouda.¹⁴⁶ In response to the visa restrictions, the ICC reiterated its commitment to 'continue ... its work undeterred' and its commitment to the rule of law.¹⁴⁷ One week later, on the 12th of April 2019, PTC II unanimously rejected the Prosecutor's article 15 request to open an investigation into alleged crimes related to the Afghanistan situation, stating 'that an investigation into the situation in Afghanistan at this stage would not serve the interests of justice'.¹⁴⁸

In the concurring and separate opinion of judge Antoine Kesia-Mbe Mindua, the judge concurred that the specific context of the Afghanistan situation made 'the prospects of a successful investigation and prosecution extremely limited'.¹⁴⁹ In his opinion, judge Antoine Kesia-Mbe Mindua recognised a need for further clarity of the 'scope' and application of the 'interests of justice' criterion.¹⁵⁰ The opinion continues to argue that an investigation which is 'doomed to failure' would not serve the interests of justice for the purposes of the Rome Statute—labelling the potential Afghanistan investigation 'stillborn' and thus an unnecessary and undesirable burden on the ICC's limited resources.¹⁵¹ Judge Mindua recognised how this determination could appear biased and politically motivated.¹⁵² It is clear in this concurring opinion that the judges considered the defensive US response and the likely impact this would have on a potential investigation before rejecting the Prosecutor's request to open an investigation into the situation in Afghanistan.¹⁵³ On the 7th of June 2019, the Prosecutor submitted a request for leave to appeal.¹⁵⁴ On the 17th of September 2019, PTC II 'granted in part' the Prosecutor's leave to appeal the decision.¹⁵⁵ The following section will set out the progressing ICC processes involving Palestine, the Appeals Chamber decision on the Afghanistan situation, and the US response to these developments.

¹⁴⁶ Patrick Wintour, Owen Bowcott and Julian Borger, 'US Revokes ICC Prosecutor's Visa Over Afghanistan Inquiry' *The Guardian* (05 April 2019) <www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor> accessed 14 June 2022.

¹⁴⁷ *ibid.*

¹⁴⁸ Rome Statute, art 15; ICC-02/17-33 (n 114); ICC, 'Afghanistan' (n 118); ICC, 'Afghanistan: ICC Pre-Trial Chamber II Authorises Prosecutor to Appeal Decision Refusing Investigation' (ICC, 17 September 2019) <www.icc-cpi.int/news/afghanistan-icc-pre-trial-chamber-ii-authorises-prosecutor-appeal-decision-refusing> accessed 05 October 2022.

¹⁴⁹ *The Situation in the Islamic Republic of Afghanistan* (Concurring and Separate Opinion of Judge Antoine Kesia-Mba Mindua) ICC-02/17-33-Anx-Corr (31 May 2019).

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ *ibid.*; ICC, 'Afghanistan' (n 118).

¹⁵⁴ *The Situation in the Islamic Republic of Afghanistan* (Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan') ICC-02/17-62 (17 September 2019), para 7.

¹⁵⁵ ICC-02/17-62 (n 154); ICC, 'ICC Pre-Trial Chamber II Authorises Prosecutor to Appeal' (n 148).

3.4: 2020: ICC inquiries into Palestine, the decision of the Appeals Chamber on the Afghanistan situation, and Executive Order 13928

The preliminary examination of the situation in the State of Palestine began in 2015.¹⁵⁶ In January 2020, the Prosecutor made a ‘request to Pre-Trial Chamber I for a ruling to clarify the territorial scope of the Court’s jurisdiction in this situation’.¹⁵⁷ On the 5th of March 2020, the ICC’s Appeals Chamber unanimously decided to amend the PTC II decision of the 12th of April 2019 concerning the Prosecutor’s request for authorisation for an investigation into the situation in Afghanistan.¹⁵⁸ It permitted the Prosecutor to open an investigation into the situation in Afghanistan.¹⁵⁹ The Appeals Chamber decided that PTC II had ‘erred’ in its decision and that the ‘interests of justice’ criterion ‘is not part of the pre-trial chamber’s decision under article 15(4)’.¹⁶⁰ The Appeals Chamber determined ‘that the factors under Article 53(1)(a) to (c) are *not* relevant for the purposes of the pre-trial chamber’s decision’.¹⁶¹ Mike Pompeo, unsurprisingly, condemned this decision.¹⁶²

Pompeo denied the ICC’s legitimacy and reaffirmed the US commitment to using any means to prevent the ICC from prosecuting US citizens.¹⁶³ On the 17th of March 2020, Pompeo named two ICC personnel, Sam Shoamanesh, a staff member of the OTP and the head of the Jurisdiction, Complementarity and Cooperation Division Phakiso Mochochoko, as individuals under consideration for coercive measures, essentially threatening ICC personnel and their

¹⁵⁶ ICC, ‘State of Palestine: Situation in the State of Palestine’ (*ICC*) <www.icc-cpi.int/palestine> accessed 14 June 2022.

¹⁵⁷ *ibid.*

¹⁵⁸ *The Situation in the Islamic Republic of Afghanistan* (Judgment on the Appeal Against the Decision on the Authorisation of an Investigation) ICC-02/17-138 (05 March 2020); ICC, ‘Afghanistan’ (n 118); ICC, ‘Afghanistan: ICC Appeals Chamber Authorises the Opening of an Investigation’ (*ICC*, 05 March 2020) <www.icc-cpi.int/news/afghanistan-icc-appeals-chamber-authorises-opening-investigation> accessed 16 June 2022.

¹⁵⁹ *ibid.*

¹⁶⁰ Rome Statute, art 15(4); ICC-02/17-138 (n 158), paras 37, 46 and 48.

¹⁶¹ ICC-02/17-138 (n 158), para 35.

¹⁶² Jennifer Hansler, ‘Pompeo slams International Criminal Court Decision to Authorize Afghanistan War Crimes Investigation’ (*CNN*, 05 March 2020) <<https://edition.cnn.com/2020/03/05/politics/icc-afghanistan-pompeo/index.html>> accessed 05 October 2022.

¹⁶³ *ibid.*; Elian Peltier and Fatima Faizi, ‘I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S.’ *The New York Times* (05 March 2020) <www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html> accessed 05 October 2022; The Washington Post, ‘Pompeo: International Criminal Court a “Renegade, Unlawful So-Called Court”’ *The Washington Post* (05 March 2020) <www.washingtonpost.com/video/world/pompeo-international-criminal-court-a-renegade-unlawful-so-called-court/2020/03/05/90b49a71-b2fc-473a-a0ca-11f8b6b23ece_video.html> accessed 05 October 2022.

families with sanctions.¹⁶⁴ Then on the 26th of March 2020, the Afghan authorities requested the deferral of the investigation, and the investigation was subsequently deferred.¹⁶⁵

In a letter dated the 13th of May 2020, signed by many US Senators, including current Vice-President Kamala Harris, many US officials demonstrated they supported the Trump administration's vehement response to these ICC inquiries.¹⁶⁶ They implored Pompeo to 'stand in full force' against the potential investigation into Palestine.¹⁶⁷ Following this on the 15th of May, Pompeo criticised the ICC for being 'a political body, not a judicial institution' in response to ICC inquiries concerning the situation in the State of Palestine, warning that '[i]f the ICC continues down its current course, we will exact consequences'.¹⁶⁸

On the 11th of June 2020, President Donald Trump issued Executive Order 13928, declaring a national emergency and permitting sanctions on any 'foreign person' having 'directly engaged in' or offering 'material assistance' to ICC investigations into US or allies' personnel without the consent of the relevant state.¹⁶⁹ Following up on the threats from Pompeo in March and May of 2020, Executive Order 13928 permitted measures including 'asset freezes' and 'family entry bans'.¹⁷⁰ Then on the 2nd of September 2020, the US announced that Prosecutor Bensouda and Phakiso Mochochoko were 'designated' to be the subject of sanctions under Executive

¹⁶⁴ Andrea Germanos, 'Bashing Probe of US War Crimes, Pompeo Threatens Family of ICC Staff With Consequences' (*Common Dreams*, 18 March 2020) <www.commondreams.org/news/2020/03/18/bashing-probe-us-war-crimes-pompeo-threatens-family-icc-staff-consequences> accessed 05 October 2022; Todd Buchwald and others, 'Former Officials Challenge Pompeo's Threats to the International Criminal Court' (*Just Security*, 18 March 2020) <www.justsecurity.org/69255/former-officials-challenge-pompeos-threats-to-the-international-criminal-court/> accessed 24 November 2022.

¹⁶⁵ Rome Statute, art 18(2); *The Situation in the Islamic Republic of Afghanistan* (Deferral Request made by the Government of the Islamic Republic of Afghanistan pursuant to Article 18(2) of the Rome Statute) ICC-02/17-139-Anx 1 (16 April 2020); ICC-OTP, 'Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC' (*ICC-OTP*, 27 September 2021) <www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> accessed 16 June 2022.

¹⁶⁶ Benjamin Cardin and Rob Portman, 'Letter from US Senators to Secretary of State Mike Pompeo' (13 May 2020) <www.portman.senate.gov/sites/default/files/2020-05/20200513%20Senate%20Letter%20to%20Pompeo%20re%20ICC%20Israel.pdf> accessed 05 October 2022.

¹⁶⁷ *ibid.*

¹⁶⁸ Elizabeth Evenson, 'US Official Threatens International Criminal Court – Again' (*Human Rights Watch*, 22 May 2020) <www.hrw.org/news/2020/05/22/us-official-threatens-international-criminal-court-again> accessed 16 June 2022; Eytan Gilboa, 'The US-Israeli Campaign Against the ICC' (*Jewish News Syndicate*, 25 May 2020) <www.jns.org/opinion/the-us-israeli-campaign-against-the-icc/> accessed 05 October 2022.

¹⁶⁹ Executive Order 13928-Blocking Property of Certain Persons Associated with the International Criminal Court (11 June 2020); Human Rights Watch, 'US Sanctions International Criminal Court Prosecutor' (*Human Rights Watch*, 02 September 2020) <www.hrw.org/news/2020/09/02/us-sanctions-international-criminal-court-prosecutor> accessed 16 June 2022.

¹⁷⁰ Executive Order 13928 (n 169); Elizabeth Evenson, 'US Again Threatens International Criminal Court' (*Human Rights Watch*, 19 March 2020) <www.hrw.org/news/2020/03/19/us-again-threatens-international-criminal-court> accessed 16 June 2022; Evenson, 'US Official Threatens International Criminal Court' (n 168); Human Rights Watch, 'US Sanctions International Criminal Court Prosecutor' (n 169).

Order 13928.¹⁷¹ On the 11th of June 2020, the ICC released a statement in response to the US measures.¹⁷² The statement called US measures ‘an unacceptable attempt to interfere with the rule of law and the Court’s judicial proceedings’.¹⁷³ The following section sets out the Biden administration’s rescinding of the sanctions and the new ICC Prosecutor Karim Khan’s approach to the Afghanistan investigation.

3.5: 2021: New administration’s new approach; new Prosecutor’s new approach, as Prosecutor Karim Khan ‘deprioritises’ alleged crimes of US nationals

Donald Trump failed to get elected for a second term in the elections held in November 2020, and Joe Biden was inaugurated in January 2021. The new administration has been much less hostile towards the ICC than the former. On the 5th of February 2021, PTC I decided on the Palestine situation, determining that the ICC ‘could exercise its criminal jurisdiction in the situation and, that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem’.¹⁷⁴ On the 3rd of March 2021, the Prosecutor opened an investigation into the situation in the State of Palestine.¹⁷⁵ Despite this decision in March 2021, in early April 2021, the Biden administration lifted the US sanctions and restrictions imposed on ICC staff during the Trump administration and repealed Executive Order 13928.¹⁷⁶

Under the Biden administration, the US has outlined its willingness to improve engagement with the ICC.¹⁷⁷ US Secretary of State Antony Blinken issued a press statement on the 2nd of April 2021, stating that the US issues with the ICC ‘would be better addressed through engagement with all stakeholders in the ICC process rather than through the imposition of sanctions’.¹⁷⁸ Secretary Blinken pointed to historical US support for and involvement in ICJ

¹⁷¹ Human Rights Watch, ‘US Sanctions International Criminal Court Prosecutor’ (n 169).

¹⁷² ICC, ‘Statement of the International Criminal Court on Recent Measures Announced by the US’ (*ICC*, 11 June 2020) <www.icc-cpi.int/news/statement-international-criminal-court-recent-measures-announced-us> accessed 05 October 2022.

¹⁷³ *ibid.*

¹⁷⁴ ICC, ‘State of Palestine’ (n 156).

¹⁷⁵ *ibid.*

¹⁷⁶ ‘Biden Administration Rescinds Sanctions Against International Criminal Court Officials’ (2021) 115 *AJIL* 729, 729-730; Human Rights Watch, ‘US Rescinds ICC Sanctions’ (*Human Rights Watch*, 02 April 2021) <www.hrw.org/news/2021/04/02/us-rescinds-icc-sanctions> accessed 16 June 2022.

¹⁷⁷ *ibid.*

¹⁷⁸ Antony J Blinken, ‘Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court’ (*U.S. Department of State*, 02 April 2021) <www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/> accessed 16 June 2022.

mechanisms concerning crimes and alleged crimes involving the Balkans, Cambodia, Rwanda, Iraq, Syria, and Burma.¹⁷⁹ After the removal of the sanctions, Prosecutor Bensouda recognised the historical significance of the US in ICJ, and both the US and the ICC signalled their willingness to rebuild the relationship and commitment to engagement and improved cooperation.¹⁸⁰

On the 27th of September 2021, the new Prosecutor, Karim Khan, sought authorisation from PTC II to resume the investigation into the situation in Afghanistan.¹⁸¹ By this stage, the investigation had seen ‘a significant change of circumstances’ as the Taliban had replaced the former Afghan national authorities.¹⁸² The new Prosecutor laid out his intentions concerning US nationals’ alleged crimes under the ICC’s jurisdiction. In his request to resume the Afghanistan investigation, Prosecutor Khan signalled his intention to ‘deprioritise’ aspects of the investigation, including US nationals’ alleged crimes and to focus on the alleged crimes of the Taliban and Islamic State - Khorasan Province.¹⁸³ Prosecutor Khan stated:

In relation to those aspects of the investigation that have not been prioritised, my Office will remain alive to its evidence preservation responsibilities, to the extent they arise, and promote accountability efforts within the framework of the principle of complementarity.¹⁸⁴

The final section before the concluding summary looks at US support for the ICC to investigate alleged crimes of Russian nationals in Ukraine.

3.6: 2022: Russo-Ukrainian War and US support for ICC involvement

There has been widespread reporting of allegations of crimes in Ukraine since the beginning of the Russian-styled ‘special military operation’ in Ukraine, the full-scale Russian invasion of

¹⁷⁹ *ibid.*

¹⁸⁰ Edith M Lederer, ‘ICC Prosecutor Hopes for New US Relations After Sanctions’ (*Associated Press*, 17 May 2021) <<https://apnews.com/article/united-nations-donald-trump-1486070a6dc353b950566f656f8fad15>> accessed 16 June 2022; Mike Corder, ‘AP Interview: ICC Prosecutor Sees ‘Reset’ Under Biden’ (*Associated Press*, 14 June 2021) <<https://apnews.com/article/government-and-politics-donald-trump-joe-biden-courts-4f191309f97a3734b032960877cccac6>> accessed 16 June 2022.

¹⁸¹ *The Situation in the Islamic Republic of Afghanistan* (Request to Authorise Resumption of Investigation Under Article 18(2) of the Statute) ICC-02/17-161 (27 September 2021); ICC-OTP, ‘Statement of Prosecutor Khan’ (n 165).

¹⁸² ICC-OTP, ‘Statement of Prosecutor Khan’ (n 165).

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

Ukraine, which commenced on the 24th of February 2022.¹⁸⁵ On the 3rd of March, Senator Lindsey Graham and other Senators from the Republican and Democratic parties sponsored a Senate resolution that spoke of the ICC in favourable terms and urged state parties to the Rome Statute to ‘petition the ICC’ to investigate Russian crimes in Ukraine.¹⁸⁶ This resolution eventually got unanimous support in a Senate vote. The Biden administration ‘welcomed’ the opening of the ICC’s Ukraine investigation.¹⁸⁷

Conclusion

This chapter has outlined a timeline of important events and decisions since 2017. This timeline illustrates an interesting and, at times, adversarial relationship between the US and the ICC since 2017. It has outlined the ICC’s decisions concerning Afghanistan, Palestine, and Ukraine. It has outlined the US response to US and Israeli nationals potentially being investigated by the ICC and US support for ICC involvement in Ukraine. Under the administration of Donald Trump, the US vehemently opposed the ICC’s legitimacy in investigating US and Israeli nationals, vowing to use any means to prevent this. Then, in 2022, some US officials encouraged ICC involvement in Ukraine to investigate alleged crimes of Russian nationals despite Russia being, like the US and Israel, a non-party state. This position appears hypocritical. The decision of PTC II not to authorise the Prosecutor to open an investigation into the Afghanistan situation appeared to capitulate to US pressure. The Appeals Chamber decision may have mitigated the damage of this. However, Karim Khan’s new approach and decision not to prioritise the alleged crimes of US nationals in his investigation may have worrying implications for perceptions of equality before the law at the ICC and stakeholders’ legitimacy perceptions. Pertinent questions remain: Have these developments negatively affected the legitimacy of the ICC in the eyes of its stakeholders? Has US policy and actions damaged the US credibility in ICJ? The next chapter will address the first question by analysing stakeholder perceptions and evaluating whether they suggest the ICC has become more or less

¹⁸⁵ Vivian Ho, ‘First Thing: Putin Unleashes Russian Invasion of Ukraine’ *The Guardian* (24 February 2022) <www.theguardian.com/us-news/2022/feb/24/first-thing-putin-declares-war-russia-invades-ukraine> accessed 14 June 2022; Hathaway (n 19).

¹⁸⁶ Expressing the sense of the Senate condemning the Russian Federation, President Vladimir Putin, members of the Russian Security Council, the Russian Armed Forces, and Russian military commanders for committing flagrant acts of aggression and other atrocities rising to the level of crimes against humanity and war crimes against the people of Ukraine and others, S Res 531, 117th Congress (2022); Hathaway (n 19).

¹⁸⁷ Colum Lynch, ‘America’s ICC Animus Gets Tested by Putin’s Alleged War Crimes’ *Foreign Policy* (15 March 2022) <<https://foreignpolicy.com/2022/03/15/us-icc-russia-invasion/>> accessed 02 July 2022.

legitimate; this is the scalar assessment. This analysis will permit an evaluation of US policies' impact on the US credibility in ICJ.

CHAPTER 4: THE SCALAR ASSESSMENT:

Introduction

The timeline in chapter three outlines the US-ICC relationship since 2017. Chapter four analyses stakeholders' responses to eight selected key developments chronologically. Critiques and reactions by scholars, lawyers, personnel of organs of the ICC, states and their representatives, civil society actors, journalists, IGO, and NGO representatives are analysed. Reports of victims' groups, submissions of victims' representatives to the ICC, and amicus curiae representations to the ICC are also analysed. Many leading academics and lawyers' analyses feature heavily in this chapter. However, they are more often found in blog posts, websites, or newspaper articles published soon after the developments occurred rather than in academic journals. There is an evaluation of responses to selected developments and an assessment of whether reactions suggest the ICC has become more or less legitimate in stakeholders' perceptions due to the developments. There is also an assessment of the impact of US policies and actions on the US credibility in ICJ.

THE TRUMP ADMINISTRATION

4.1: Lead up to and eventual request to open an investigation into Afghanistan

The first development is the lead-up to and eventual request to the PTC to permit the Prosecutor to open an investigation into the Afghanistan situation. This development marked the first time US nationals were potentially under ICC scrutiny.¹⁸⁸ This development may have sent the US and the ICC on a collision course, as the US had consistently refused to accept the ICC's jurisdiction over US nationals. Reactions are analysed, and there is an assessment of the impact of this development on stakeholders' perceptions of the ICC's legitimacy.

Prominent lawyers working for NGOs, Richard Dicker and Katherine Gallagher, praised the request for signalling that the ICC would act impartially and exemplify equality before the law in fulfilling its mandate.¹⁸⁹ Many stakeholders, including victims, supported the request and

¹⁸⁸ Human Rights Watch, 'Afghanistan and the International Criminal Court: Questions and Answers' (*Human Rights Watch*, 20 November 2017) <www.hrw.org/news/2017/11/20/afghanistan-and-international-criminal-court#3> accessed 31 October 2022.

¹⁸⁹ International Federation for Human Rights, 'International Crimes Committed in Afghanistan: Towards International Criminal Court Prosecutions of All Operating Forces?' (*FIDH*, 03 November 2017) <www.fidh.org/en/region/asia/afghanistan/international-crimes-committed-in-afghanistan-towards-

urged the PTC to permit the Prosecutor to open the investigation and conduct it as outlined in the request.¹⁹⁰ The Afghanistan Independent Human Rights Commission ‘welcomed’ the Prosecutor’s move and stated that the ICC is an ‘essential’ mechanism for combatting impunity.¹⁹¹ The Transitional Justice Coordination Group urged the PTC to open the investigation and urged Afghan authorities to cooperate.¹⁹² International Federation for Human Rights Vice-President and Armanshahr/Open Asia Executive Director Guisso Jahangiri called on the PTC to open the investigation.¹⁹³ Amnesty International’s Solomon Sacco stated that this request was a ‘seminal moment’ and ‘investigations like this one are the reason the Court was set up’.¹⁹⁴ Jamil Dakwar and Joshua Manson promoted ICC involvement for the proliferation of the norm that there should not be impunity for torture.¹⁹⁵ However, not all stakeholders viewed the development as a positive.

Pentagon spokesperson Eric Pahon stated, ‘Our view is clear: An ICC investigation with respect to U.S. personnel would be wholly unwarranted and unjustified’.¹⁹⁶ John Bolton

international> accessed 31 October 2022; Coalition for the International Criminal Court, ‘Reactions: ICC Investigation for Afghanistan?’ (*Coalition for the International Criminal Court*, 07 November 2017) <www.coalitionfortheicc.org/news/20171107/reactions-icc-investigation-afghanistan> accessed 31 October 2022; Human Rights Watch, ‘Afghanistan: ICC Prosecutor Asks to Open Inquiry’ (*Human Rights Watch*, 20 November 2017) <www.hrw.org/news/2017/11/20/afghanistan-icc-prosecutor-asks-open-inquiry> accessed 31 October 2022.

¹⁹⁰ *The Situation in the Islamic Republic of Afghanistan* (Public redacted version of “First Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, 7 December 2017, ICC-02/17-10-Conf) ICC-02/17-11-Red (07 December 2017), para 20; *The Situation in the Islamic Republic of Afghanistan* (Public redacted version of “Fourth Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017”, 25 January 2017, ICC-02/17-20-Conf) ICC-02/17-20-Red (25 January 2018), para 12.

¹⁹¹ Afghanistan Independent Human Rights Commission, ‘Press Release on the International Criminal Court Prosecutor’s Request for Authorization to Launch an Investigation into the Situation of Afghanistan’ (*Afghanistan Independent Human Rights Commission*, 04 November 2017) <www.aihrc.org.af/home/press_release/6766#> accessed 31 October 2022; Ehsan Qaane and Kate Clark, ‘One Step Closer to War Crimes Trials (2): ICC Prosecutor Requests Authorisation to Investigate’ (*Afghanistan Analysts Network*, 05 November 2017) <www.afghanistan-analysts.org/en/reports/rights-freedom/one-step-closer-to-war-crimes-trials-2-icc-prosecutor-requests-authorisation-to-investigate/> accessed 31 October 2022; Coalition for the International Criminal Court (n 189).

¹⁹² Qaane and Clark, ‘One Step Closer to War Crimes Trials’ (n 191).

¹⁹³ International Federation for Human Rights, ‘International Crimes Committed in Afghanistan’ (n 189); Coalition for the International Criminal Court (n 189).

¹⁹⁴ Amnesty International, ‘Afghanistan: ICC Investigation Request a Seminal Moment for International Justice’ (*Amnesty International*, 03 November 2017) <www.amnesty.org/en/latest/press-release/2017/11/afghanistan-icc-investigation-request-a-seminal-moment-for-international-justice/> accessed 31 October 2022.

¹⁹⁵ Jamil Dakwar and Joshua Manson, ‘U.S. Gave Its Torturers a Pass, So International Court Steps In’ (*ACLU*, 08 November 2017) <www.aclu.org/news/national-security/us-gave-its-torturers-pass-so-international-court-steps> accessed 31 October 2022.

¹⁹⁶ Merrit Kennedy, ‘ICC Prosecutor Calls for Afghanistan War Crimes Investigation’ (*NPR*, 03 November 2017) <www.npr.org/sections/thetwo-way/2017/11/03/561842662/icc-prosecutor-calls-for-afghanistan-war-crimes-investigation> accessed 31 October 2022.

implored the Trump administration not to ‘acknowledge the ICC’s legitimacy’.¹⁹⁷ Bolton stated: ‘America’s long-term security depends on refusing to recognise an iota of legitimacy in this brazen effort to subordinate democratic nations to the unaccountable melding of executive and judicial authority in the ICC’.¹⁹⁸ Bolton raised some legal issues concerning the US-ICC relationship. However, his response seems mainly concerned with ensuring US autonomy in determining how to contend with its national security objectives.

In Bolton’s estimation, it is reasonable to assume that the ICC was always considered illegitimate concerning Americans. There is a view among some US officials that the US should not relinquish any autonomy to the ICC over how it conducts its wars and national security tactics, which exhibits an ideological incompatibility with the ICC. Opposition from the US may be damaging to the ICC’s legitimacy in a broad sense. However, observers generally recognise that states will oppose the ICC when the ICC attempts to scrutinise state actors without the support of the state’s government. In considering the ICC’s legitimacy, *impartial* observers’ perceptions may reflect a more balanced view. The increased attention the ICC may get from friction with the influential US could bolster the ICC’s legitimacy. However, opposition from the US suggests that some elements within the US saw the move as damaging to the ICC’s legitimacy. Nevertheless, most stakeholders’ responses suggest that this development positively affected their perceptions of the ICC’s legitimacy. The following section analyses stakeholders’ responses to Fatou Bensouda’s visa revocation.

4.2: Visa restrictions imposed

It is now pertinent to consider the effects of the visa revocation on stakeholder perceptions of the legitimacy of the ICC and the US credibility in ICJ by analysing and evaluating stakeholder responses. Predominantly representatives from human rights organisations, lawyers and scholars were critical of the US approach, with many believing that the move damaged the credibility and reputation of the US in ICJ. Dakwar called the policy ‘misguided and dangerous’.¹⁹⁹ The Amnesty Centre for International Justice indicated that the US had taken

¹⁹⁷ John Bolton, ‘The Hague Aims for U.S. Soldiers’ *The Wall Street Journal* (20 November 2017) <www.wsj.com/articles/the-hague-tiptoes-toward-u-s-soldiers-1511217136> accessed 02 November 2022.

¹⁹⁸ *ibid.*

¹⁹⁹ American Civil Liberties Union, ‘ACLU Comment on U.S. Barring Entry Of ICC Investigators’ (*ACLU*, 15 March 2019) <www.aclu.org/press-releases/aclu-comment-us-barring-entry-icc-investigators> accessed 06 November 2022.

the wrong approach.²⁰⁰ Stephen Rapp stated that the visa revocation ‘hurts the U.S. reputation far more than it hinders the I.C.C. prosecutor’.²⁰¹ Rapp criticised the policy for signalling that the US ‘had something to hide’ and aligning the US with the ‘world’s thugs and dictators’.²⁰²

Others called the US out for attempting to interfere with the ICC, its independence and impartiality. Katherine Gallagher condemned the restrictions for interfering with ‘judicial proceedings’ and breaching international law.²⁰³ Richard Dicker labelled the move by the US as ‘an outrageous effort to bully the court and deter scrutiny of US conduct’ and criticised the signals that this approach was emanating.²⁰⁴ Judith Kelley raised the issue of the impact of US policies on global attitudes towards ‘support for multilateral cooperation and the global rule of law’.²⁰⁵ Daniel Balson of Amnesty International condemned the US approach as an ‘attack on international justice’.²⁰⁶ Balson stated, ‘[i]mpeding the work of ICC investigators disrupts its vital function and demands impunity for the White House’s own policies’.²⁰⁷ Balson warned of the signals that this would send to other states.²⁰⁸ Representatives of No Peace Without Justice even called on the ICC to investigate Mike Pompeo for obstruction of justice.²⁰⁹ Predominantly, scholars, lawyers, and representatives of civil society groups, advocacy groups and NGOs expressed support for the ICC and were highly critical of the US approach. Nevertheless, many recognised the damage that the US approach could do to the ICC, with

²⁰⁰ Marlise Simons and Megan Specia, ‘U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes’ *The New York Times* (05 April 2019) <www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html> accessed 04 November 2022.

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ Jessica Corbett, ‘“Shameful”: Trump Admin Revokes ICC Prosecutor’s Visa Over Probe of Potential US War Crimes in Afghanistan’ (*Common Dreams*, 06 April 2019) <www.commondreams.org/news/2019/04/06/shameful-trump-admin-revokes-icc-prosecutors-visa-over-probe-potential-us-war-crimes> accessed 06 November 2022.

²⁰⁴ Human Rights Watch, ‘US Threatens International Criminal Court’ (*Human Rights Watch*, 15 March 2019) <www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court> accessed 06 November 2022.

²⁰⁵ Judith Kelley, ‘The U.S. Revoked the Visa for the ICC Prosecutor. That Bodes Poorly for International Criminal Justice.’ (*Duke University Sanford School of Public Policy*, 08 April 2019) <<https://sanford.duke.edu/story/us-revoked-visa-icc-prosecutor-bodes-poorly-international-criminal-justice/>> accessed 06 November 2022.

²⁰⁶ Amnesty International, ‘Trump Administration Attempts to Thwart International Criminal Court Investigators’ (*Common Dreams*, 15 March 2019) <www.commondreams.org/newswire/2019/03/15/trump-administration-attempts-thwart-international-criminal-court-investigators> accessed 06 November 2022.

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ No Peace Without Justice, ‘ICC Prosecutor Should Indict Secretary Pompeo for Obstruction of Justice, Under Article 70 of the Rome Statute’ (*No Peace Without Justice*, 15 March 2019) <www.npwj.org/ICC/ICC-Prosecutor-should-indict-Secretary-Pompeo-obstruction-justice-under-Article-70-Rome-Statute.> accessed 06 November 2022.

many warning about the signals that the US approach would send to other states. It is now beneficial to consider the responses of states and IGOs.

The Foreign Ministers of 22 countries endorsed a statement confirming their commitment to the ICC and concern about US measures.²¹⁰ This message categorised US efforts as ‘intimidation’.²¹¹ There was strong support for the ICC and concern about the visa restrictions from many European Union (EU) member states.²¹² The Canadian government supported the ICC and believed the US approach was wrong.²¹³ Many representatives from IGOs echoed these views. Then President of the Assembly of States Parties (ASP) confirmed the ASPs’ support for the ICC in response to Pompeo’s threats in March 2019.²¹⁴ Then ICC President, judge Chile Eboe-Osuji, urged the US to ‘reconsider their position’.²¹⁵ UN experts called US sanctions ‘improper interference’ with the work of the ICC and its independence and expressed their ‘deep concern’.²¹⁶

The US is an influential actor; some stakeholders may view the ICC as damaged by a confrontation with the US. However, the US’s aggressive approach may have invigorated the ICC’s supporters. Although many warned against the signals the US approach would send, at this stage, stakeholder statements do not suggest that stakeholders perceived the ICC’s

²¹⁰ Ministry of Foreign Affairs of Ecuador, ‘Ecuador Reiterates Its Support for the International Criminal Court’ (*Ministerio de Relaciones Exteriores y Movilidad Humana*, 21 March 2019) <www.cancilleria.gob.ec/2019/03/21/ecuador-reitera-su-apoyo-a-la-corte-penal-internacional/> accessed 04 November 2022; Liechtenstein UN, ‘In Addition to Recent National Statements in Support of the Independence of the #ICC, the Following Statement Has Been Endorsed by 22 Foreign Ministers’ (*Twitter*, 29 March 2019) <<https://twitter.com/LiechtensteinUN/status/1111777186418167815>> accessed 04 November 2022.

²¹¹ Liechtenstein UN (n 210).

²¹² European Union External Action Service, ‘Statement by the Spokesperson on the International Criminal Court’ (*European External Action Service Website*, 15 March 2019) <http://www.eeas.europa.eu/node/59733_en> accessed 04 November 2022; Ministère de l’Europe et des Affaires étrangères, ‘Support for the International Criminal Court’ (*France Diplomacy - Ministry for Europe and Foreign Affairs*, 18 March 2019) <www.diplomatie.gouv.fr/en/french-foreign-policy/international-justice/news/article/support-for-the-international-criminal-court-18-03-19> accessed 04 November 2022; ‘Check out #ICC States Parties’ Reactions to #US Move against the Court’ (*Twitter*, 29 March 2019) <<https://twitter.com/i/events/1106668772956475393>> accessed 04 November 2022.

²¹³ Global Affairs Canada, ‘Statement on the International Criminal Court’ (*Government of Canada*, 18 March 2019) <www.canada.ca/en/global-affairs/news/2019/03/statement-on-the-international-criminal-court.html> accessed 04 November 2022.

²¹⁴ Assembly of States Parties, ‘Statement by the President of the Assembly, O-Gon Kwon, Reiterating Strong Support for the ICC’ (*ICC*, 15 March 2019) <www.icc-cpi.int/news/statement-president-assembly-o-gon-kwon-reiterating-strong-support-icc> accessed 06 November 2022.

²¹⁵ Al Jazeera, ‘Full Text of John Bolton’s Speech’ (n 22); Frank Suyak, ‘ICC President: “The Court is not dying.”’ (*DW*, 03 April 2019) <www.dw.com/en/how-does-the-international-criminal-court-answer-criticisms-that-it-is-illegitimate/a-48180371> accessed 06 November 2022.

²¹⁶ OHCHR, ‘US “threats” Against International Criminal Court Must Stop, Say UN Experts’ (*OHCHR*, 22 March 2019) <www.ohchr.org/en/news/2019/03/us-threats-against-international-criminal-court-must-stop-say-un-experts> accessed 06 November 2022.

legitimacy as being damaged because of Prosecutor Bensouda's visa revocation. Stakeholder responses suggest this development damaged the credibility of the US in ICJ, putting them at odds with many historical allies concerning ICJ. In the following section, stakeholder responses to the PTC II decision to deny the Prosecutor's request are analysed and evaluated.

4.3: Request denied (PTC II decision of the 12th of April 2019)

The following development is the first in this chapter that damaged perceptions of the ICC's legitimacy of some of its consistent supporters. The PTC's decision to reject the Prosecutor's request to begin an investigation into the Afghanistan situation received heavy criticism. It is helpful to consider the reactions to this decision to analyse its impact on ICC legitimacy perceptions.

Human rights and civil society actors were predominantly critical of the judges' decision and reasoning.²¹⁷ Amnesty International's Biraj Patnaik stated that the PTC decision was a "craven capitulation to Washington's bullying".²¹⁸ Human Rights Watch criticised the PTC for appearing swayed by political considerations.²¹⁹ Param Preet-Singh viewed the ICC's judges as having damaged the ICC's credibility and criticised the judges' decision for indicating to states that 'obstructionist tactics' are rewarded.²²⁰ Many lawyers and scholars echoed this view.²²¹ Kevin Jon Heller lambasted the judges' reasoning; one of his primary criticisms is the

²¹⁷ Toby Sterling and Stephanie van den Berg, 'Facing Hurdles from U.S., War Crimes Judges Reject Afghan Probe' (*Reuters*, 12 April 2019) <www.reuters.com/article/us-warcrimes-afghanistan-idUSKCN1RO1DZ> accessed 10 November 2022; Merrit Kennedy, 'World Criminal Court Rejects Probe Into U.S. Actions In Afghanistan' (*NPR*, 12 April 2019) <www.npr.org/2019/04/12/712721556/world-criminal-court-rejects-probe-into-u-s-actions-in-afghanistan> accessed 10 November 2022; Hadi Marifat, 'ICC Pre-Trial Judges' Decision Shatters Hopes for Justice in #Afghanistan, Says #TJCG, a Coalition of 26 Human Rights Organization in a Statement Released Today @Intlcrimcourt @Amnesty @Hrw @Markkersten @amalnassar_ @Guissoujahangir @Ap @Vdbergstephanie @D_Carlens @AJEnglish Pic.twitter.com/9as9upug8q' (*Twitter*, 13 April 2019) <<https://twitter.com/HMarifat/status/1117055962219720707>> accessed 12 November 2022.

²¹⁸ BBC, 'ICC Rejects Request to Investigate War Crimes in Afghanistan' (*BBC*, 12 April 2019) <www.bbc.co.uk/news/world-asia-47912140> accessed 16 June 2022.

²¹⁹ Human Rights Watch, 'ICC: Judges Reject Afghanistan Investigation' (*Human Rights Watch*, 12 April 2019) <www.hrw.org/news/2019/04/12/icc-judges-reject-afghanistan-investigation> accessed 10 November 2022.

²²⁰ *ibid*; Param-Preet Singh, 'In Afghanistan, the ICC Abandons the Field' (*Human Rights Watch*, 23 April 2019) <www.hrw.org/news/2019/04/23/afghanistan-icc-abandons-field> accessed 12 November 2022.

²²¹ Dov Jacobs, 'ICC Pre-Trial Chamber Rejects OTP Request to Open an Investigation in Afghanistan: Some Preliminary Thoughts on an ultra vires Decision' (*Spreading the Jam*, 12 April 2019) <<https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/>> accessed 12 November 2022; Patryk Labuda, 'A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court's Afghanistan Decision' (*EJIL:Talk!*, 13 April 2019) <www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/> accessed 12 November 2022; Todd Buchwald, 'The International Criminal Court Decision on Afghanistan: Time to Start a New Conversation'

signals the decision sends about the consequences of states' recalcitrance.²²² Vasiliev stated that this decision is 'problematic' for the symbolic value and legitimacy of the ICC and that this decision's 'legitimacy costs' would be 'high'.²²³

It is hard to deny that the judges considered the political realities; their reasoning shows this. Mark Kersten was critical of the judges' reasoning and scant explanation and that the judges did not reference 'any other cases or jurisprudence on the subject'.²²⁴ Kersten's analysis of this decision is insightful; even with an entirely recalcitrant US, opening the investigation 'would likely bolster – not undermine – the court's credibility'.²²⁵ Victims' representatives filed a notice of appeal.²²⁶ Human Rights Watch criticised the judges for denying the victims 'a path to justice'.²²⁷ Dakwar criticised the decision for its implications for victims, stating that it would 'weaken' the ICC.²²⁸ Amnesty International criticised the judges for *abandoning* victims and viewed this decision as harmful to the ICC's legitimacy.²²⁹ Katie Taylor of Reprieve also criticised the decision for its implications for victims' access to justice.²³⁰ Alternatively, Alex Whiting had a pragmatic reaction to the decision, stressing the importance of allocating the

(*Just Security*, 13 April 2019) <www.justsecurity.org/63622/the-international-criminal-court-decision-on-afghanistan-time-to-start-a-new-conversation/> accessed 12 November 2022; Gabor Rona, 'More on What's Wrong with the ICC's Decision on Afghanistan' (*Opinio Juris*, 15 April 2019) <<http://opiniojuris.org/2019/04/15/more-on-whats-wrong-with-the-iccs-decision-on-afghanistan/>> accessed 12 November 2022; Christian De Vos, 'No ICC Investigation in Afghanistan: A Bad Decision with Big Implications' (*International Justice Monitor*, 15 April 2019) <www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/> accessed 12 November 2022; Sergey Vasiliev, 'Not just another 'crisis': Could the blocking of the Afghanistan investigation spell the end of the ICC? (Part I)' (*EJIL:Talk!*, 19 April 2019) <www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-i/> accessed 12 November 2022; Sergey Vasiliev, 'Not just another 'crisis': Could the blocking of the Afghanistan investigation spell the end of the ICC? (Part II)' (*EJIL:Talk!*, 20 April 2019) <www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-ii/> accessed 12 November 2022.

²²² Kevin Jon Heller, 'One Word for the PTC on the Interests of Justice: Taliban' (*Opinio Juris*, 13 April 2019) <<http://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/>> accessed 12 November 2022.

²²³ Vasiliev, '(Part II)' (n 221).

²²⁴ Mark Kersten, 'The ICC Was Wrong to Deny Prosecution Request for Afghan Probe' (*Al Jazeera*, 12 April 2019) <www.aljazeera.com/opinions/2019/4/12/the-icc-was-wrong-to-deny-prosecution-request-for-afghan-probe> accessed 10 November 2022.

²²⁵ *ibid.*

²²⁶ *The Situation in the Islamic Republic of Afghanistan* (Notice of appeal against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" (ICC-02/17-33) ICC-02/17-40 (10 June 2019).

²²⁷ Human Rights Watch, 'ICC: Judges Reject Afghanistan Investigation' (n 219).

²²⁸ Owen Bowcott, 'ICC Rejects Request to Investigate War Crimes in Afghanistan' *The Guardian* (12 April 2019) <www.theguardian.com/law/2019/apr/12/icc-rejects-request-to-investigate-war-crimes-in-afghanistan> accessed 12 November 2022.

²²⁹ Chase Winter, 'ICC Rejects Afghanistan War Crimes Probe' (*DW*, 12 April 2019) <www.dw.com/en/icc-rejects-afghanistan-war-crimes-probe/a-48308608> accessed 10 November 2022.

²³⁰ Bowcott (n 228).

ICC's resources wisely.²³¹ Nevertheless, it is reasonable to assert that this development negatively affected the ICC's legitimacy to many civil society actors and groups. Next, it is beneficial to consider how other stakeholders responded for a complete overview of how this development affected the ICC's sociological legitimacy.

The White House denied the ICC's legitimacy in its response.²³² Donald Trump and Mike Pompeo celebrated this decision as a victory.²³³ The administration's position had support from some US politicians who publicly responded.²³⁴ Israeli Prime Minister Benjamin Netanyahu also welcomed the decision.²³⁵ While this shows support for the decision, it does not logically follow that the ICC's legitimacy improved for these stakeholders.²³⁶ With the high-ranking state officials' responses analysed, political aims may colour perceptions of the ICC. However, concerning the US and Israeli leadership, their responses to the decision suggest they may see the ICC as illegitimate, at least concerning their states' nationals as non-party states. This development is the first for which there is overwhelming evidence that the ICC's legitimacy was negatively affected in the eyes of many diverse stakeholders. Next, responses to the Appeals Chamber's decision are analysed and evaluated.

4.4: Appeal decision

The next development is the Appeals Chamber's decision authorising the Prosecutor to investigate the Afghanistan situation. Critics lambasted the PTC's decision to reject the Prosecutor's request to open an investigation into the situation in Afghanistan; therefore, it should not be a surprise that the decision to permit the investigation to proceed received much public support. Stakeholders' responses are considered next.

²³¹ Alex Whiting, 'The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?' (*Just Security*, 12 April 2019) <www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/> accessed 10 November 2022.

²³² Nic Rowan, 'ICC Rejects Request for Investigation into U.S. 'War Crimes' in Afghanistan' (*The Washington Free Beacon*, 12 April 2019) <<https://freebeacon.com/national-security/icc-rejects-war-crimes-investigation-request/>> accessed 12 November 2022.

²³³ BBC, 'ICC Rejects Request to Investigate War Crimes' (n 218); Human Rights Watch, 'ICC: Judges Reject Afghanistan Investigation' (n 219); Sterling and van den Berg (n 217).

²³⁴ Rowan (n 232).

²³⁵ Haaretz, 'Netanyahu Congratulates Trump on ICC Decision Not to Investigate U.S. Forces' *Haaretz* (14 April 2019) <www.haaretz.com/israel-news/2019-04-14/ty-article/.premium/netanyahu-congratulates-trump-on-icc-decision-not-to-investigate-u-s-forces/0000017f-dc31-db5a-a57f-dc7b41c60000> accessed 12 November 2022.

²³⁶ Sterling and van den Berg (n 217).

Jennifer Trahan stated, ‘the Appeals Chamber undid jurisprudence that could have become quite problematic for the future work of the Court’ and praised the decision for signalling the ICC’s commitment to its mandate.²³⁷ Param-Preet Singh praised the decision for signalling that victims should have access to justice and for signalling the impartiality of the ICC.²³⁸ Many commentators and human rights organisations in Afghanistan and worldwide echoed this sentiment.²³⁹ American legal scholar William Burke-White labelled the Appeals Chamber decision ‘legally sound and ethically right’.²⁴⁰ Burke-White characterised the Appeals decision as a potential turning point for the ICC that could allow it to pivot from seeking US support to focusing on scrutinising the US.²⁴¹ Nikki Reisch praised the decision for signalling that ‘authoritarian tendencies’ should not be accepted.²⁴² The New York City Bar Association praised the ICC as a defender of the rule of law.²⁴³ The American Civil Liberties Union (ACLU) and the Coalition for the ICC supported the decision.²⁴⁴ UN Special Rapporteurs, international lawyers and Prosecutors, diplomats, human rights advocates, NGOs and scholars

²³⁷ Jennifer Trahan, ‘The Significance of the ICC Appeals Chamber’s Ruling in the Afghanistan Situation’ (*Opinio Juris*, 10 March 2020) <<http://opiniojuris.org/2020/03/10/the-significance-of-the-icc-appeals-chambers-ruling-in-the-afghanistan-situation/>> accessed 18 November 2022.

²³⁸ Human Rights Watch, ‘ICC Greenlights Afghanistan Investigation’ (*Human Rights Watch*, 05 March 2020) <www.hrw.org/news/2020/03/05/icc-greenlights-afghanistan-investigation> accessed 18 November 2022.

²³⁹ Ehsan Qaane and Kate Clark, ‘War Crimes Investigation in Afghanistan by the ICC: It’s happening. What will it mean?’ (*Afghanistan Analysts Network*, 05 March 2020) <www.afghanistan-analysts.org/en/reports/rights-freedom/war-crimes-investigation-in-afghanistan-by-the-icc-its-happening-what-will-it-mean/> accessed 18 November 2022; AIHRC, ‘@AFGHANISTANIHRC Welcomes the ICC Decision for Opening an Investigation on War Crimes & Crimes against Humanity in Afghanistan. Important Step for Justice in Afghanistan’s Long War’ (*Twitter*, 05 March 2020) <<https://twitter.com/afghanistanihrc/status/1235517094491566080>> accessed 18 November 2022; Shadi Khan Saif, ‘ICC Approves Probe on Afghanistan War Crimes’ (*Anadolu Agency*, 05 March 2020) <www.aa.com.tr/en/asia-pacific/icc-approves-probe-on-afghanistan-war-crimes/1755583#> accessed 18 November 2022; Ayaz Gul, ‘International Criminal Court Allows Afghanistan War Crimes Probe’ (*VOA News*, 05 March 2020) <www.voanews.com/a/europe_international-criminal-court-allows-afghanistan-war-crimes-probe/6185293.html> accessed 18 November 2022; The Center for Constitutional Rights, ‘International Criminal Court Authorizes Investigation into U.S. Torture Program, Other International Crimes’ (*The Center for Constitutional Rights*, 05 March 2020) <<https://ccrjustice.org/home/press-center/press-releases/international-criminal-court-authorizes-investigation-us-torture>> accessed 18 November 2022; Merrit Kennedy, ‘International Criminal Court Allows Investigation of U.S. Actions in Afghanistan’ (*NPR*, 05 March 2020) <www.npr.org/2020/03/05/812547513/international-criminal-court-allows-investigation-of-u-s-actions-in-afghanistan> accessed 18 November 2022; International Federation for Human Rights, ‘Happenings in The Hague: An Explainer on the Recent ICC Decision on Afghanistan’ (*FIDH*, 10 March 2020) <www.fidh.org/en/issues/international-justice/international-criminal-court-icc/happenings-in-the-hague-an-explainer-on-the-recent-icc-decision-on> accessed 18 November 2022.

²⁴⁰ William Burke-White, ‘The Trump Administration Misplayed the International Criminal Court and Americans May Now Face Justice for Crimes in Afghanistan’ (*Brookings*, 11 March 2020) <www.brookings.edu/blog/order-from-chaos/2020/03/11/the-trump-administration-misplayed-the-international-criminal-court-and-americans-may-now-face-justice-for-crimes-in-afghanistan/> accessed 19 November 2022.

²⁴¹ *ibid.*

²⁴² The Center for Constitutional Rights, ‘International Criminal Court Authorizes Investigation into U.S. Torture Program’ (n 239).

²⁴³ The New York City Bar Association, ‘Reaffirming Support for The International Criminal Court (ICC Court)’ (*The New York City Bar Association*, 21 April 2020) <www.nycbar.org/media-listing/media/detail/support-for-the-international-criminal-court> accessed 19 November 2022.

²⁴⁴ Hansler, ‘Pompeo Slams International Criminal Court Decision’ (n 162).

‘submitted amicus briefs in support of the investigation.’²⁴⁵ This decision was recognised for its potential to send a powerful message regarding the ICC’s impartiality and independence.²⁴⁶ Stakeholders predominantly saw the Appeal’s decision as a positive development for the ICC’s legitimacy. It is viewed as mitigating the negative impact of the PTC II’s controversial original decision. However, the most vehement opposition to this development came from the US and will be considered further in the next section.

4.5: US response to the opening of the Afghanistan investigation and progression of ICC inquiries into Palestine

The development considered in this section is the US response to the opening of the Afghanistan investigation and the progressing ICC inquiries concerning Palestine. The response included issuing Executive Order 13928 and the designation of Fatou Bensouda and Phakiso Mochochoko to be subject to sanctions. Reactions are analysed to assess the impact of US measures on stakeholders’ perceptions of the ICC’s legitimacy and the US credibility in ICJ. As this development is itself a response and because there was a large volume of reactions from many diverse stakeholders, it will be beneficial for clarity to split the responses into categories in this section. First, US officials’ responses are analysed before looking at the responses of other states and IGOs. Then there is a consideration of NGOs’ and civil society actors’ responses, first looking at those that were critical of the US response before considering those that supported the US response.

4.5.1: US officials’ responses

There was significant support in the US for a strong response to these ICC processes. The Trump administration aimed to delegitimise the ICC; while relevant, US government officials’ perceptions must be understood to be affected by political considerations and national interest. William Barr, then US Attorney-General, viewed the measures as ‘an important first step in holding the ICC accountable for exceeding its mandate and violating the sovereignty of the United States’.²⁴⁷ Barr accused other states of interfering with the ICC and the OTP of

²⁴⁵ The Center for Constitutional Rights, ‘International Criminal Court Authorizes Investigation into U.S. Torture Program’ (n 239).

²⁴⁶ ICJ Africa, ‘Finally the International Criminal Court Shows its Teeth in the Situation in Afghanistan’ (*ICJ Africa*, 08 March 2020) <www.icjafrika.com/single-post/2020/03/08/enfin-la-cour-pénale-internationale-montre-ses-dents-dans-la-situation-en-afghanistan> accessed 19 November 2022.

²⁴⁷ UN News, ‘US Sanctions Against International Court Staff a “Direct Attack” on Judicial Independence’ (*UN News*, 25 June 2020) <<https://news.un.org/en/story/2020/06/1067142>> accessed 19 November 2022.

‘corruption and malfeasance’, accusing Russia of manipulating the ICC but not offering any evidence or explanation.²⁴⁸ Kayleigh McEnany, then White House Press Secretary, also labelled ICC inquiries a threat to US sovereignty.²⁴⁹ However, some senior US politicians outside the Trump administration were critical of the administration’s approach, including Bernie Sanders and Patrick Leahy.²⁵⁰

The US’s strong reaction may highlight the seriousness with which they considered ICC scrutiny; this could have bolstered the ICC’s sociological legitimacy to some stakeholders.²⁵¹ Considering the evident politicisation of the US response and the US position on ICJ historically, it suggests that some in the US view the ICC as illegitimate regarding Americans; they may have taken this position to protect specific interests. The US position is antithetical to the impartiality and independence of the ICC. The US response was designed for political expediency, to promote the administration’s aims and is therefore treated with some scepticism here. The most reasonable inference is that some high-ranking US politicians either viewed the ICC as having weakened its legitimacy due to its inquiries concerning Afghanistan and Palestine or viewed the ICC as illegitimate. Other stakeholders’ reactions to the US approach must now be analysed to determine an overview of perceptions regarding the opening of the Afghanistan investigation, the progressing inquiries relating to Palestine and the US response.

4.5.2: Responses from IGOs and their representatives and other states officials’ responses

The ten members of the UNSC at the time that were ICC state parties released a joint statement ‘to reconfirm ... unwavering support for the Court as an independent and impartial judicial

²⁴⁸ Robbie Gramer and Jack Detsch, ‘Trump Order Treats International Prosecutors Like War Criminals’ (*Foreign Policy*, 11 June 2020) <<https://foreignpolicy.com/2020/06/11/trump-sanction-international-criminal-court-human-rights-violations-afghanistan-us-troops-esper-pompeo-international-law/>> accessed 23 November 2022; France 24, ‘Trump Authorises Sanctions on ICC Staff Investigating US War Crimes in Afghanistan’ (*France 24*, 12 June 2020) <www.france24.com/en/20200611-usa-afghanistan-icc-sanctions-taliban-war-crimes-hague-donald-trump> accessed 23 November 2022.

²⁴⁹ Jennifer Hansler, ‘US Sanctions International Criminal Court Officials’ (*CNN*, 02 September 2020) <<https://edition.cnn.com/2020/09/02/politics/us-icc-sanctions/index.html>> accessed 19 November 2022.

²⁵⁰ Beth Van Schaack, ‘The Int’l Criminal Court Executive Order: Global Reactions Compiled’ (*Just Security*, 01 September 2020) <www.justsecurity.org/72256/the-intl-criminal-court-executive-order-global-reactions-compiled/> accessed 24 November 2022; Bernie Sanders, ‘Sanctioning the International Criminal Court shows once again that Trump is on the side of Authoritarians around the world. The United States should be working to strengthen international human rights standards, not targeting officials who uphold them’ (*Twitter*, 02 September 2020) <<https://twitter.com/SenSanders/status/1301244152634585091>> accessed 23 November 2022.

²⁵¹ Hansen (n 125).

institution' undeterred by any 'threats'.²⁵² Then President of the ASP stated his regret at US measures, declared 'unwavering commitment' to the ICC and called on 'States Parties and all the stakeholders' to 'reiterate' their support for the ICC.²⁵³ The ICC reiterated its commitment to its mandate.²⁵⁴ Then President of the ICC, judge Chile Eboe-Osuji's response was insightful; he recognised powerful states see the ICC as a threat to their autonomy, 'political interests and aspirations', and this inherently demonstrates the ICC's 'value for humanity'.²⁵⁵ The EU labelled US sanctions 'unacceptable'.²⁵⁶ Josep Borrell, EU High Representative, stated, '[w]e will resolutely defend it (the ICC) from any attempts aimed at obstructing the course of justice and undermining the international system of criminal justice'.²⁵⁷ The UN took 'note with concern' over the Executive Order, said a spokesperson for the Secretary-General.²⁵⁸ UN human rights experts criticised the US measures, particularly for threatening 'victims' access to justice', for attacking the rule of law by interfering with the independence and impartiality of the ICC, and for its broad attack on human rights defenders and organisations.²⁵⁹

A joint cross-regional statement by 67 ICC state parties confirmed these states' commitment to the ICC and its independence and impartiality in the face of US threats, including several

²⁵² United Nations, 'International Criminal Court Members of the Council on the ICC and Sudan - Virtual Media Stakeout' (*YouTube*, 10 June 2020) <www.youtube.com/watch?v=FVEKk1hcRhA> accessed 19 November 2022.

²⁵³ ICC, 'ASP President O-Gon Kwon Rejects Measures Taken Against ICC' (*ICC*, 11 June 2020) <www.icc-cpi.int/news/asp-president-o-gon-kwon-rejects-measures-taken-against-icc> accessed 19 November 2022.

²⁵⁴ ICC, 'Statement of the International Criminal Court on Recent Measures Announced by the US' (n 172).

²⁵⁵ Edith M Lederer, 'Over 70 ICC Nations Support Court and Oppose US Sanctions' *The Washington Times* (02 November 2020) <https://m.washingtontimes.com/news/2020/nov/2/over-70-icc-nations-support-court-and-oppose-us-sa/?utm_source=ground.news&utm_medium=referral> accessed 24 November 2022.

²⁵⁶ Emma Anderson, 'EU Urges US to Reverse Sanctions Against ICC Staff' (*Politico*, 03 September 2020) <www.politico.eu/article/eu-urges-us-to-reverse-sanctions-against-icc-staff/> accessed 19 November 2022.

²⁵⁷ Josep Borrell, 'International Criminal Court: Statement by the High Representative/Vice-President Josep Borrell on US Sanctions' (*European Union External Action*, 03 September 2020) <www.eeas.europa.eu/eeas/international-criminal-court-statement-high-representativevice-president-josep-borrell-us_en> accessed 19 November 2022.

²⁵⁸ Mike Corder, 'International Criminal Court Condemns U.S. Sanctions Order' (*PBS*, 12 June 2020) <www.pbs.org/newshour/world/international-criminal-court-condemns-u-s-sanctions-order> accessed 23 November 2022.

²⁵⁹ OHCHR, 'US Attacks Against the International Criminal Court a Threat to Judicial Independence – UN experts' (*OHCHR*, 25 June 2020) <www.ohchr.org/en/press-releases/2020/06/us-attacks-against-international-criminal-court-threat-judicial-independence> accessed 23 November 2022; UN News, "'Direct Attack" on Judicial Independence' (n 247).

NATO members.²⁶⁰ Dutch Foreign Minister Stef Blok ‘condemned’ the sanctions.²⁶¹ The French Foreign Minister called on the US to change its approach and withdraw the sanctions.²⁶² The Gambian government and the government of Lesotho ‘expressed concern’ at US sanctions and support for their nationals Bensouda and Mochochoko.²⁶³ Benjamin Netanyahu was supportive of the US approach.²⁶⁴

It is telling that public support for the US approach largely came from Israel.²⁶⁵ Israel is a close US ally, and neither the US nor Israel supported ICC inquiries potentially implicating their nationals. This partiality must be considered when analysing these stakeholders’ responses. The response from IGOs and other states is predominantly unified and coherent in its defence of the ICC in the face of US sanctions. This support for the ICC suggests the US approach may have galvanised the ICC’s supporters, and stakeholders’ responses broadly defended the ICC, suggesting that the measures did not harm the ICC’s legitimacy and could have bolstered its legitimacy. The attention the US drew towards the ICC may have had an undesired effect. The US approach damaged the credibility of the US, on ICJ, in the perceptions of many officials in other states or those representing relevant IGOs.

²⁶⁰ Permanent mission of France to the United Nations in New York, ‘Statement in support of the International Criminal Court (ICC) following the release of the US Executive Order of 11 June 2020’ (*Permanent mission of France to the United Nations in New York*, 23 June 2020) <<https://onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order>> accessed 19 November 2022.

²⁶¹ Julian Borger, ‘Trump Targets ICC With Sanctions After Court Opens War Crimes Investigation’ *The Guardian* (11 June 2020) <www.theguardian.com/us-news/2020/jun/11/trump-icc-us-war-crimes-investigation-sanctions> accessed 23 November 2022; Hansler, ‘US Sanctions International Criminal Court Officials’ (n 249).

²⁶² Ministère de l’Europe et des Affaires étrangères, ‘International Criminal Court - Announcement of individual sanctions by the United States - Statement by Jean-Yves Le Drian, Minister for Europe and Foreign Affairs’ (*France Diplomacy - Ministry for Europe and Foreign Affairs*, 03 September 2020) <www.diplomatie.gouv.fr/en/french-foreign-policy/international-justice/news/article/international-criminal-court-announcement-of-individual-sanctions-by-the-united> accessed 19 November 2022.

²⁶³ The Voice Gambia, ‘Govt. Expresses Dismay Over US Sanction Against ICC Chief Prosecutor, Other Staff’ (*The Voice Gambia*, 07 September 2020) <www.voicegambia.com/2020/09/07/govt-expresses-dismay-over-us-sanction-against-icc-chief-prosecutor-other-staff/> accessed 23 November 2022; The Point, ‘Gambia Urges U.S. to Reverse Sanctions on ICC Prosecutor’ *The Point* (07 September 2020) <<https://thepoint.gm/africa/gambia/headlines/gambia-urges-u-s-to-reverse-sanctions-on-icc-prosecutor>> accessed 23 November 2022; Marafaele Mohloboli, ‘Lesotho: Govt “Concerned” Over U.S. Sanctions on ICC Duo’ (*AllAfrica*, 15 September 2020) <<https://allafrica.com/stories/202009150934.html>> accessed 23 November 2022.

²⁶⁴ Borger (n 261).

²⁶⁵ Alex Ward, ‘Why the Trump Administration is Sanctioning a Top International Court’ (*Vox*, 12 June 2020) <www.vox.com/2020/6/12/21287798/trump-international-criminal-court-sanctions-explained> accessed 23 November 2022.

4.5.3: NGOs' and civil society actors' responses: responses critical of the US

Human rights groups were generally critical of the measures.²⁶⁶ Balkees Jarrah of Human Rights Watch criticised the sanctions as a 'shameful new low for US commitments to justice for victims of the worst crimes', calling the policy a 'stunning perversion of US sanctions'.²⁶⁷ Richard Dicker called the US approach 'extortion'.²⁶⁸ Over 50 groups, including human rights groups, victims' groups, and other advocacy groups, were critical of the US policies and urged the US to reverse course in a joint statement.²⁶⁹

Retired US Army Officer Wesley Clark called the US approach 'unnecessary' and 'a tragic mistake' and accused the US of acting like a 'rogue state'.²⁷⁰ Former US Ambassadors-at-Large and international Prosecutors, including Nuremberg Prosecutor Benjamin Ferencz, co-signed a statement labelling the US approach 'reckless and shocking' and reiterating the widespread criticism of the policies for damaging the US standing in ICJ and for being antithetical to the rule of law.²⁷¹ Clint Williamson, former US Ambassador-at-Large for War Crimes Issues, stated, 'the United States stands virtually alone among liberal democracies in its rejection of the ICC'.²⁷² Williamson viewed the Trump administration's approach as damaging to the US international standing.²⁷³ David Kaye and Beth Van Schaack were both critical of the US approach, particularly for sanctioning international civil servants.²⁷⁴ Haley Anderson viewed the US choice of targets to designate as subjects of the sanctions as problematic because the US designated two African officials and ignored other potential subjects from other regions.²⁷⁵

²⁶⁶ Human Rights Watch, 'Oppose Trump Administration Measures against the International Criminal Court' (*Human Rights Watch*, 11 June 2020) <www.hrw.org/news/2020/06/11/oppose-trump-administration-measures-against-international-criminal-court> accessed 23 November 2022; Human Rights Watch, 'US Sanctions International Criminal Court Prosecutor' (n 169).

²⁶⁷ BBC, 'International Criminal Court Officials Sanctioned by US' (*BBC*, 02 September 2020) <www.bbc.co.uk/news/world-us-canada-54003527> accessed 19 November 2022.

²⁶⁸ Human Rights Watch, 'ICC: Member Countries Rally Around Court' (*Human Rights Watch*, 23 June 2020) <www.hrw.org/news/2020/06/23/icc-member-countries-rally-around-court> accessed 19 November 2022.

²⁶⁹ Human Rights Watch, 'Oppose Trump Administration Measures' (n 266).

²⁷⁰ Wesley K Clark, 'The United States Has Nothing to Fear From the ICC' (*Foreign Policy*, 02 July 2020) <<https://foreignpolicy.com/2020/07/02/the-united-states-has-nothing-to-fear-from-the-icc/>> accessed 24 November 2022.

²⁷¹ Buchwald and others (n 164).

²⁷² Clint Williamson, 'Amb. Williamson: Trump Administration's Actions towards ICC Damage U.S. Global Standing' (*International Rule of Law and Security Newsletter*, 12 June 2020) <<http://newsletters.asucollegeoflaw.com/irls/2020/06/12/amb-williamson-trump-administrations-actions-towards-icc-damage-u-s-global-standing/>> accessed 19 November 2022.

²⁷³ *ibid.*

²⁷⁴ Gramer and Detsch (n 248).

²⁷⁵ Haley Anderson, 'Why Them? On the U.S. Sanctions Against Int'l Criminal Court Officials' (*Just Security*, 02 September 2020) <www.justsecurity.org/72275/why-them-on-the-u-s-sanctions-against-intl-criminal-court-officials/> accessed 23 November 2022.

William Burke-White called the measures ‘fundamentally misguided’.²⁷⁶ Burke-White viewed these measures as damaging to the US ‘commitment to human rights and the rule of law’ and called the US categorisation of the ICC ‘threat’ as a national emergency ‘almost farcical’.²⁷⁷ He recognised the US response as a ‘recognition of the power of international law’.²⁷⁸ He criticised the US for using measures usually reserved for terrorists or dictators on international lawyers working for an institution established by multilateral agreement between many states.²⁷⁹ Burke-White argued that this approach would strengthen ICC efforts, not weaken them.²⁸⁰ However, he warned that this set a ‘dangerous’ precedent for despots worldwide, and many echoed this view.²⁸¹

Almost 190 American lawyers and legal scholars signed a statement condemning the Executive Order and imploring the US to reverse course.²⁸² This statement viewed these measures as damaging to the US ‘credibility’.²⁸³ Many who publicly supported the ICC in response to US threats and sanctions raised the issue that the US was attacking the victims’ ability to achieve justice.²⁸⁴ The International Bar Association (IBA) condemned the Executive Order.²⁸⁵ The American Bar Association (ABA) President stated she was ‘deeply disturbed’ by the Executive Order.²⁸⁶ Four law professors and the Open Society Justice Initiative took a case to a US federal court against President Trump, Mike Pompeo, and other administration members due to legal

²⁷⁶ William Burke-White, ‘The Danger of Trump’s New Sanctions on the International Criminal Court and Human Rights Defenders’ (*Brookings*, 11 June 2020) <www.brookings.edu/blog/order-from-chaos/2020/06/11/the-danger-of-trumps-new-sanctions-on-the-international-criminal-court-and-human-rights-defenders/> accessed 23 November 2022.

²⁷⁷ *ibid.*

²⁷⁸ *ibid.*

²⁷⁹ *ibid.*

²⁸⁰ *ibid.*

²⁸¹ *ibid.*

²⁸² Kevin Jon Heller, ‘Statement Against US Sanctions on ICC Investigations (Updated)’ (*Opinio Juris*, 30 June 2020) <<http://opiniojuris.org/2020/06/30/statement-against-us-sanctions-on-icc-investigations/>> accessed 23 November 2022.

²⁸³ *ibid.*

²⁸⁴ Rashaan Ayesh, ‘Trump Targets International Criminal Court for Sanctions Over War Crimes Probe’ (*Axios*, 12 June 2020) <www.axios.com/2020/06/11/trump-sanctions-icc-war-crimes-afghanistan> accessed 23 November 2022.

²⁸⁵ International Bar Association, ‘IBA Condemns US President’s Executive Order Authorising Sanctions Against International Criminal Court Personnel’ (*International Bar Association*, 12 June 2020) <www.ibanet.org/article/91b435ac-2ab3-4dad-b8b2-2f6c18d8aecd> accessed 24 November 2022.

²⁸⁶ Judy Perry Martinez, ‘ABA President Judy Perry Martinez statement Re: U.S. sanctions of International Criminal Court Personnel’ (*American Bar Association*, 12 June 2020) <www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-judy-perry-martinez-statement-re--u-s--sanctions-o/> accessed 24 November 2022.

issues with Executive Order 13928.²⁸⁷ ACLU attorneys also brought a case against the Trump administration, disputing the legality and constitutionality of the Executive Order.²⁸⁸ These cases ended after the Executive Order was rescinded. That these cases were filed demonstrates that the Trump-era policies may have damaged the US credibility in ICJ. Sarah Leah Whitson called the US approach ‘uniquely perverse’.²⁸⁹ Whitson raised concerns about the longer-term impact of the US attitude towards the ICC on the strength of accountability and anti-impunity norms and any deterrent effect of the ICC.²⁹⁰

4.5.4: NGOs’ and civil society actors’ responses: supporters of the US approach

The US approach had some support. Brett Schaefer and the Heritage Foundation supported the administration’s approach.²⁹¹ The Conference of Presidents of Major Jewish Organizations was critical of the ICC’s situation choices and stated that these would ‘jeopardise’ the organisation’s legitimacy.²⁹² Morse Tan labelled the ICC ‘corrupt’.²⁹³ John Yoo and Ivana Stradner framed the ICC’s steps as threatening US national sovereignty, encouraging the US to ‘weaken defense ties with ICC member countries, and cut foreign aid to any nation that cooperates with the Court’.²⁹⁴ Yoo’s links to the alleged US crimes are relevant when weighing his perception, as he was one of the drafters of the ‘torture memos’.²⁹⁵ The controversial ‘torture memos’ advised the CIA that the use of ‘enhanced interrogation techniques’ was legally permissible.²⁹⁶ There

²⁸⁷ Open Society Justice Initiative, ‘Open Society Justice Initiative et al. v. Donald J. Trump et al.’ (*Open Society Justice Initiative*) <www.justiceinitiative.org/litigation/open-society-justice-initiative-et-al-v-donald-j-trump-et-al> accessed 23 November 2022.

²⁸⁸ American Civil Liberties Union, ‘ACLU Clients Challenge Trump’s Sanctions Order Against International Criminal Court’ (*ACLU*, 15 January 2021) <www.aclu.org/press-releases/aclu-clients-challenge-trumps-sanctions-order-against-international-criminal-court> accessed 04 December 2022.

²⁸⁹ Sarah Leah Whitson, ‘Collective Punishment Against ICC officials – and their Families’ (*Responsible Statecraft*, 21 March 2020) <<https://responsiblestatecraft.org/2020/03/21/collective-punishment-against-icc-officials-and-their-families/>> accessed 23 November 2022.

²⁹⁰ *ibid.*

²⁹¹ The Heritage Foundation, ‘Heritage Expert Applauds Trump Administration for Sanctions on International Criminal Court’ (*The Heritage Foundation*, 15 July 2020) <www.heritage.org/impact/heritage-expert-applauds-trump-administration-sanctions-international-criminal-court> accessed 24 November 2022.

²⁹² The Times of Israel, ‘ICC Shuns “Unprecedented” US Sanctions Against Tribunal Employees’ (*The Times of Israel*, 12 June 2020) <www.timesofisrael.com/icc-shuns-unprecedented-us-sanctions-against-tribunal-employees/> accessed 23 November 2022.

²⁹³ Lederer, ‘Over 70 ICC Nations Support Court and Oppose US Sanctions’ (n 255).

²⁹⁴ John Yoo and Ivana Stradner, ‘The U.S. Must Reject the International Criminal Court’s Attack on Its National Sovereignty’ (*National Review*, 17 March 2020) <www.nationalreview.com/2020/03/united-states-must-reject-international-criminal-court-attack-on-national-sovereignty/> accessed 24 November 2022.

²⁹⁵ Andrew Cohen, ‘The Unrepentant John Yoo: “Enhanced Interrogation” Got Us bin Laden’ (*The Atlantic*, 05 May 2011) <www.theatlantic.com/politics/archive/2011/05/the-unrepentant-john-yoo-enhanced-interrogation-got-us-bin-laden/238356/> accessed 24 November 2022.

²⁹⁶ Allen Weiner, ‘The Torture Memos and Accountability’ (*ASIL Insights*, 15 May 2009) <<https://asil.org/insights/volume/13/issue/6/torture-memos-and-accountability>> accessed 30 January 2023.

have been calls for those ‘who formulated the legal guidance’ authorising the use of torture to face criminal trials.²⁹⁷ Therefore, Yoo cannot be considered an impartial stakeholder.

4.5.5: Analysis of stakeholders’ responses to this development

The US approach appeared undiplomatic, hypocritical, and contrary to the rule of law. The US had little public support from other states, barring chiefly and unsurprisingly, Israel. Israel does not appear to be an objective supporter of the US position; instead, a fierce US ally that strongly opposed the ICC investigating alleged crimes concerning the situation in Palestine. For these purposes, however, generally, stakeholder responses suggest that the Trump-era US-ICC relationship damaged the US credibility in ICJ. The ICC’s sociological legitimacy was not negatively affected due to the interactions during this time; the public responses analysed support this evaluation. Generally, voices criticising the legitimacy of the ICC are coming from officials and former officials with an interest in preventing the ICC from investigating their state’s citizen’s actions. Next is an analysis and evaluation of responses to the developments occurring after the Biden administration had taken control of the White House.

THE BIDEN ADMINISTRATION

4.6: Sanctions rescinded

The next development selected is the Biden administration’s rescission of the sanctions and Executive Order 13928. The approach of the Biden administration may be more diplomatic, but it does not exhibit US commitment to ICJ.²⁹⁸ The Biden administration maintains that ICC jurisdiction over US nationals can only follow US ratification of the Rome Statute. Nevertheless, the administration is willing to use its influence over the ICC to encourage investigations it supports, including into other non-party states nationals’ alleged crimes. It is again pertinent to analyse stakeholders’ responses to evaluate the impact of this development on the ICC’s sociological legitimacy and the US credibility in ICJ. This section begins by analysing the responses of NGOs and civil society actors.

²⁹⁷ *ibid.*

²⁹⁸ Richard J Goldstone, ‘Renewed US Support Can Strengthen International Justice’ (*International Criminal Justice Today*, 24 May 2021) <www.international-criminal-justice-today.org/arguendo/renewed-us-support-can-strengthen-international-justice/> accessed 04 December 2022.

The ABA and the IBA ‘welcomed’ the removal of the sanctions and the rescission of Executive Order 13928.²⁹⁹ The IBA President framed this as a ‘step’ in the right direction regarding US commitment ‘to the rule of law and ... justice for atrocity crimes’.³⁰⁰ Philippe Sands ‘welcomed’ the removal of the sanctions.³⁰¹ Sands stated, ‘[i]t will be good to have the U.S. back fighting for the international rule of law, not against it’.³⁰² However, not openly fighting against the international rule of law is not the same as fighting for it.³⁰³ Owiso Owiso argued that praise for removing the sanctions was ‘undeserved’.³⁰⁴ Owiso’s analysis is reasonable; the US has damaged its credibility in ICJ. Richard Dicker’s take was perspicacious, seeing the removal of sanctions as the beginning of ‘the long process of restoring US credibility on international justice through the ICC’.³⁰⁵

Victor Ochen gave a personal account of his feelings on the removal of the sanctions, feeling ‘a profound sense of relief’.³⁰⁶ Ochen viewed the removal of the sanctions as ‘reinforcing a clear message of hope and peace—to the world’.³⁰⁷ However, it is not easy to share this optimism. Amnesty International called on the US to go further by ratifying the Rome Statute.³⁰⁸ The Center for Constitutional Rights (CCR) welcomed the removal of the sanctions, astutely describing this as an ‘overdue - step toward curtailing U.S. obstruction of accountability at the’ ICC.³⁰⁹ The CCR and Amnesty International’s responses are perceptive.

²⁹⁹ Patricia Lee Refo, ‘Statement of ABA President Patricia Lee Refo Re: Removing U.S. Sanctions on ICC Personnel’ (*American Bar Association*, 05 April 2021) <www.americanbar.org/news/abanews/aba-news-archives/2021/04/statement-of-aba-president-patricia-lee-refo-re--removing-u-s--s/> accessed 04 December 2022; International Bar Association, ‘IBA Welcomes Removal of Sanctions on ICC Prosecutor and Senior Official’ (*International Bar Association*, 07 April 2021) <www.ibanet.org/article/105373F3-A6DC-4CDF-9688-87A522FE1611> accessed 04 December 2022.

³⁰⁰ International Bar Association, ‘IBA Welcomes Removal of Sanctions’ (n 299).

³⁰¹ Pranshu Verma and Marlise Simons, ‘Reversing Trump, Biden Repeals Sanctions on Human Rights Prosecutor’ *The New York Times* (02 April 2021) <www.nytimes.com/2021/04/02/us/politics/biden-international-criminal-court-sanctions.html> accessed 04 December 2022.

³⁰² *ibid.*

³⁰³ Owiso Owiso, ‘ICC Sanctions Symposium: The United States of America, Racism and Sanctions Meet at the International Criminal Court’ (*Opinio Juris*, 19 April 2021) <<http://opiniojuris.org/2021/04/19/icc-sanctions-symposium-the-united-states-of-america-racism-and-sanctions-meet-at-the-international-criminal-court/>> accessed 04 December 2022.

³⁰⁴ *ibid.*

³⁰⁵ Human Rights Watch, ‘US Rescinds ICC Sanctions’ (n 176).

³⁰⁶ Victor Ochen, ‘Why the End of U.S. Sanctions on the International Criminal Court Matters to My Community’ (*Open Society Justice Initiative*, 19 April 2021) <www.justiceinitiative.org/voices/why-the-end-of-us-sanctions-on-the-international-criminal-court-matters-to-my-community> accessed 04 December 2022.

³⁰⁷ *ibid.*

³⁰⁸ France 24, ‘Biden Lifts US Sanctions on ICC Officials Imposed by Trump’ (*France 24*, 03 April 2021) <www.france24.com/en/americas/20210403-biden-lifts-us-sanctions-on-icc-officials-imposed-by-trump> accessed 04 December 2022.

³⁰⁹ The Center for Constitutional Rights, ‘Biden Repeal of Trump International Criminal Court Sanctions Welcome but Overdue, Say Lawyers for Victims at ICC’ (*The Center for Constitutional Rights*, 02 April 2021)

Al-Haq welcomed the development.³¹⁰ A statement from over 80 NGOs advocated for the position the Biden administration went on to take.³¹¹ Christopher Hale saw the removal of the sanctions as a return to ‘long-standing foreign policy’ which could bolster US ‘foreign policy credibility’.³¹² Hale argued that a more diplomatic and ‘principled’ approach to the ICC would ‘garner the Biden White House much-needed legitimacy’.³¹³ Hale recognised the US could not continue to defend impunity for alleged US crimes related to the Afghanistan situation ‘without significant cost to both the U.S. and ICC’.³¹⁴ The American Israel Public Affairs Committee, a pro-Israel lobbying group, criticised the move.³¹⁵ The lobbying group J Street, a pro-Israel organisation prioritising peace, alternatively welcomed the sanctions end.³¹⁶ Next, it is pertinent to consider the responses of states and IGOs.

President of the ASP Silvia Fernandez de Gurmendi described the removal of the sanctions as ‘helpful in promoting “a rules-based international order.”’³¹⁷ The ICC personnel named as subjects of the sanctions welcomed their removal and set out their wish for ‘a cooperative relationship’.³¹⁸ Lesotho’s Foreign Affairs and International Relations Minister expressed the Lesotho government’s delight at the sanctions end.³¹⁹ The ICC welcomed the policy change and looked forward to the potential ‘to reengage with the US’.³²⁰

<<https://ccrjustice.org/home/press-center/press-releases/biden-repeal-trump-international-criminal-court-sanctions-welcome>> accessed 04 December 2022.

³¹⁰ Al-Haq, ‘Al-Haq Welcomes the Rescinding of US Executive Order 13928, Recalls the Necessity that the International Criminal Court Investigate the Situation in Palestine’ (*Al-Haq*, 05 April 2021) <www.alhaq.org/advocacy/18151.html> accessed 04 December 2022.

³¹¹ Human Rights Watch, ‘More Than 80 Non-Governmental Organizations, Faith-Based Groups, and Academic Institutions Call for the Biden Administration to Repeal ICC Sanctions’ (*Human Rights Watch*, 17 February 2021) <www.hrw.org/news/2021/02/17/more-80-non-governmental-organizations-faith-based-groups-and-academic-institutions> accessed 04 December 2022.

³¹² Christopher Hale, ‘U.S.-ICC Relations Under a Biden Administration: Room to Be Bold’ (*Just Security*, 22 January 2021) <www.justsecurity.org/74302/u-s-icc-relations-under-a-biden-administration-room-to-be-bold/> accessed 04 December 2022.

³¹³ *ibid.*

³¹⁴ *ibid.*

³¹⁵ The Times of Israel, ‘European Union Lauds US Decision to Drop Sanctions Against ICC Prosecutor’ (*The Times of Israel*, 03 April 2021) <www.timesofisrael.com/european-union-lauds-us-decision-to-drop-sanctions-against-icc-prosecutor/> accessed 04 December 2022.

³¹⁶ *ibid.*

³¹⁷ Ellen Knickmeyer and Matthew Lee, ‘Biden lifts Trump Sanctions on International Court Officials’ (*AP News*, 03 April 2021) <<https://apnews.com/article/joe-biden-donald-trump-courts-genocides-war-crimes-85e208128086b0cfaff7e216cf7eb778>> accessed 04 December 2022.

³¹⁸ Lesotho Times, ‘US Lifts Sanctions on Lesotho National at ICC’ (*Lesotho Times*, 17 April 2021) <<https://lestimes.com/us-lifts-sanctions-on-lesotho-national-at-icc/>> accessed 04 December 2022.

³¹⁹ *ibid.*

³²⁰ ICC, ‘The ICC Welcomes the Decision by the US Government Ending Sanctions and Visa Restrictions Against ICC Personnel’ (*ICC*, 03 April 2021) <www.icc-cpi.int/news/icc-welcomes-decision-us-government-ending-sanctions-and-visa-restrictions-against-icc> accessed 04 December 2022.

Josep Borrell stated that this was a step in the right direction from the US and reiterated the EU's support for the ICC.³²¹ Borrell signalled the EU's support of 'the "universality" of the Rome Statute'.³²² Over '50 former prime ministers, foreign ministers and senior international officials' from European states indicated their commitment to the ICC in a letter to the Guardian.³²³ These officials viewed the ending of the sanctions as a move in the right direction.³²⁴ The government of Japan echoed these views.³²⁵ A spokesperson for the UN Secretary-General stated that this was a welcome development and indicated support for the ICC.³²⁶ Secretary Blinken called the sanctions 'inappropriate and ineffective'.³²⁷ Representative Ilhan Omar 'lauded' the decision to remove the measures.³²⁸ In the US, more moderate voices were prominent, and of course, this is a product of the change of administration. Benjamin Netanyahu alternatively 'urged' the Biden administration to keep the sanctions in place.³²⁹

In holistically analysing the responses to the removal of the sanctions, stakeholders generally viewed this development as a positive for the US and the ICC. There is evidence that it strengthened perceptions of the legitimacy of the ICC. Many stakeholders indicated a commitment to the ICC in response to this development. It is observed in the stakeholders' responses that this development may have restored a level of US credibility on ICJ. In the following section, there is a consideration of responses to Karim Khan's decision to deprioritise aspects of the Afghanistan investigation and an evaluation of what these responses suggest for this thesis.

³²¹ France 24, 'Biden Lifts US Sanctions' (n 308).

³²² *ibid.*

³²³ Letters, 'Attacks on the ICC Must be Condemned' *The Guardian* (31 May 2021) <www.theguardian.com/law/2021/may/31/attacks-on-the-icc-must-be-condemned> accessed 04 December 2022.

³²⁴ *ibid.*

³²⁵ Ministry of Foreign Affairs of Japan, 'Lifting of sanctions by the United States against the International Criminal Court' (*Ministry of Foreign Affairs of Japan*, 03 April 2021) <www.mofa.go.jp/press/release/press4e_002992.html> accessed 04 December 2022.

³²⁶ UN News, 'Secretary-General Welcomes US Decision to Lift Sanctions Against ICC Officials' (*UN News*, 03 April 2021) <<https://news.un.org/en/story/2021/04/1089002>> accessed 04 December 2022.

³²⁷ Ron Kampeas, 'Biden Removes Trump-era Sanctions on International Criminal Court' (*Philadelphia Jewish Exponent*, 05 April 2021) <www.jewishexponent.com/2021/04/05/biden-removes-trump-era-sanctions-on-international-criminal-court/> accessed 04 December 2022.

³²⁸ Nahal Toosi, 'Biden Lifts Sanctions on International Criminal Court Officials' (*Politico*, 02 April 2021) <www.politico.com/news/2021/04/02/icc-sanctions-reversed-biden-478731> accessed 04 December 2022.

³²⁹ Al Jazeera, 'Israel Asked US Not to Lift Trump-era ICC Sanctions: Report' (*Al Jazeera*, 25 February 2021) <www.aljazeera.com/news/2021/2/25/israel-asked-us-not-to-lift-trump-era-icc-sanctions-report> accessed 04 December 2022.

4.7: Karim Khan's deprioritisation of aspects of the Afghanistan investigation

The new Prosecutor, Karim Khan, changed the OTP's approach to the Afghanistan investigation. Khan decided to deprioritise elements of the investigation, particularly those that implicated the US, despite no new information on US domestic inquiries and in contravention of the decisions and inquiries conducted and laid down before he took office.³³⁰ Prosecutor Khan's announcement signalled the intention to 'promote accountability efforts within the framework of the principle of complementarity' concerning the parts of the investigation not prioritised.³³¹ Khan's position is that the evidence suggests that the 'prioritised' crimes were 'the worst in terms of gravity and scale'.³³² Many praised the decision to investigate the 'prioritised' groups and hold them accountable for their crimes. However, the selective nature of the Prosecutor's approach proved controversial.³³³ Again, it will be informative to analyse the stakeholders' responses to evaluate what their responses suggest was the effect of the development on the sociological legitimacy of the ICC and US credibility in ICJ. The analysis will begin by considering the responses of states' officials and IGOs.

US State Department spokesperson Jalina Porter indicated her department was 'pleased' by the Prosecutor's approach.³³⁴ The Taliban labelled the ICC biased.³³⁵ On the 31st of October 2022, PTC II authorised the Prosecutor to resume the investigation in Afghanistan.³³⁶ The judges interestingly stressed that the 'authorisation relates to all alleged crimes falling within the situation'—explicitly referring to the 2017 request which named US forces and the CIA.³³⁷ This authorisation appears to include direction by the judges to the Prosecutor on how to

³³⁰ Julian Elderfield, 'Uncertain Future for the ICC's Investigation into the CIA Torture Program' (*Just Security*, 12 November 2021) <www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/> accessed 05 December 2022.

³³¹ *ibid.*

³³² Shamali Madina Kohistani, 'ICC Prosecutor Defends Dropping US from Afghan War Crimes Probe' (*Tolo News*, 07 December 2021) <<https://tolonews.com/afghanistan-175784>> accessed 05 December 2022.

³³³ International Federation for Human Rights, 'Resumption of the ICC Investigation Into Afghanistan, While Welcome, Should Not Exclude Groups of Victims or Crimes Within the Court's Jurisdiction' (*International Federation for Human Rights*, 28 September 2021) <www.fidh.org/en/region/asia/afghanistan/resumption-of-the-icc-investigation-into-afghanistan-while-welcome> accessed 05 December 2022.

³³⁴ Anthony Deutsch and Stephanie van den Berg, 'War Crimes Prosecutor Would Not Focus on U.S. Forces in New Afghanistan Probe' (*Reuters*, 27 September 2021) <www.reuters.com/world/asia-pacific/icc-prosecutor-seeks-authorisation-resume-afghanistan-war-crimes-investigation-2021-09-27/> accessed 05 December 2022.

³³⁵ Kohistani (n 332).

³³⁶ Human Rights Watch, 'ICC: Afghanistan Inquiry Can Resume' (*Human Rights Watch*, 31 October 2022) <www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume> accessed 05 December 2022.

³³⁷ ICC, 'ICC Judges Authorise Prosecution to Resume Investigation in Afghanistan' (*ICC*, 31 October 2022) <www.icc-cpi.int/news/icc-judges-authorise-prosecution-resume-investigation-afghanistan> accessed 05 December 2022.

conduct investigations. This instruction is somewhat of a rebuke of the Prosecutor's 'deprioritising' statement of September 2021. Nevertheless, given that the Prosecutor's office controls the investigation and requests the issuance of warrants and summonses, this 'deprioritisation' is concerning. Next, analysing the responses of NGOs and civil society actors is beneficial.

Human rights activist Horia Mosadiq believed this decision would likely damage the ICC's legitimacy in the eyes of many Afghans.³³⁸ Activist Shaharзад Akbar viewed the move as corroborating a narrative that the ICC is a tool of the West.³³⁹ Jennifer Gibson of Reprieve labelled the move 'political' and called it out for favouring the US and its allies.³⁴⁰ Ghulam Sakhi, human rights activist and researcher involved with Afghan human rights groups, stated his view that the influence of major powers over ICJ was 'tragic', believing the ICC should investigate alleged crimes of all parties to the conflict.³⁴¹ Human Rights Watch's Patricia Gossman and Liz Evenson, and Matt Cannock of Amnesty International, criticised the measure for its potential impact on perceptions of the independence and impartiality of the ICC.³⁴²

Both Liz Evenson and Katherine Gallagher raised the issue that the Prosecutor's move rewards recalcitrance, which sends a dangerous message.³⁴³ Gallagher criticised the use of 'the language of terrorism' by the ICC Prosecutor when referring to the crimes of Islamic State.³⁴⁴ Gallagher noted that the political connotations of 'the language of terrorism' suggests that the ICC considers states' aims rather than whether acts amount to crimes under the Rome Statute.³⁴⁵ Consequently, its potential to protect civilians could be damaged.³⁴⁶ Gallagher warned the ICC against allowing states to dictate its activities through its budget.³⁴⁷ The ICC's limited resources are an oft-cited justification for deprioritising elements of the Afghanistan

³³⁸ Janet Anderson, 'Afghanistan: A War of Positions at the ICC' (*JusticeInfo*, 21 October 2021) <www.justiceinfo.net/en/83498-afghanistan-war-of-position-icc.html> accessed 05 December 2022.

³³⁹ Alice Speri, 'How the U.S. Derailed an Effort to Prosecute its Crimes in Afghanistan' (*The Intercept*, 05 October 2021) <<https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/>> accessed 05 December 2022.

³⁴⁰ *ibid.*

³⁴¹ *ibid.*

³⁴² *ibid.*; Anderson (n 338).

³⁴³ Gasia Ohanes, 'ICC Asked to Resume Probe into Taliban, IS in Afghanistan' (*DW*, 27 September 2021) <www.dw.com/en/icc-under-fire-for-seeking-afghanistan-probe-without-us-focus/a-59325722> accessed 05 December 2022; Anderson (n 338).

³⁴⁴ ICC-OTP, 'Statement of Prosecutor Khan' (n 165); Speri (n 339).

³⁴⁵ Speri (n 339).

³⁴⁶ *ibid.*

³⁴⁷ The Center for Constitutional Rights, 'International Criminal Court Shuttters Investigation Into U.S. Torture' (*The Center for Constitutional Rights*, 27 September 2021) <<https://ccrjustice.org/home/press-center/press-releases/international-criminal-court-shuttters-investigation-us-torture>> accessed 05 December 2022.

investigation.³⁴⁸ Amnesty International urged the Prosecutor to investigate all sides involved in the situation, viewing the decision as dangerous for the legitimacy of the OTP.³⁴⁹ Human rights advocacy groups were also critical of the Prosecutor's choice not to consult with relevant stakeholders about this approach before making the announcement.³⁵⁰ Some victims' representatives welcomed the Prosecutor's transparency and recognised his office's mandate to 'establish priorities'; however, they called on organs of the ICC to improve their outreach to victims and called for the 'proper distribution of information'.³⁵¹ Other representatives, including Katherine Gallagher, expressed deep concern over the move and called on the Prosecutor to give 'equal priority' to the alleged crimes of the 'deprioritised' groups.³⁵²

Deprioritising the alleged crimes of US forces and the CIA and the alleged crimes of the previous, US-backed Afghan authorities have been viewed as a 'setback' for the 'equal application of the rule of law'.³⁵³ These allegations' systemic nature and scale would seem to put them squarely within the ICC's remit.³⁵⁴ It is not difficult to imagine that the ICC deciding not to investigate alleged US and United Kingdom crimes concerning Iraq and Afghanistan could make the ICC appear pro-western and biased and damage legitimacy perceptions.³⁵⁵ The ICC has already suffered these criticisms for several years.³⁵⁶ Of course, Khan is British; in Trahan's perspicacious view, this exacerbates 'the problematic optics'.³⁵⁷ Trahan's analysis that the US sees 'itself as above the rule of law' is a logical inference taken from US policy and actions.³⁵⁸ Trahan viewed Khan's decision to deprioritise US nationals' alleged crimes as

³⁴⁸ Anderson (n 338).

³⁴⁹ Amnesty International, 'Afghanistan: ICC Prosecutor's Statement on Afghanistan Jeopardises his Office's Legitimacy and Future' (*Amnesty International*, 05 October 2021) <www.amnesty.org/en/documents/ior53/4842/2021/en/> accessed 05 December 2022.

³⁵⁰ International Federation for Human Rights, 'Resumption of the ICC investigation into Afghanistan' (n 333).

³⁵¹ *The Situation in the Islamic Republic of Afghanistan* (Response to "Request to Authorise Resumption of Investigation Under Article 18(2) of the Statute" (ICC-02/17-161)) ICC-02/17-164 (01 October 2021).

³⁵² *The Situation in the Islamic Republic of Afghanistan* (Response to "Request to Authorise Resumption of Investigation Under Article 18(2) of the Statute") ICC-02/17-167-AnxA (7 October 2021).

³⁵³ Jennifer Trahan, 'Prosecutor De-Prioritizes ICC Investigation of US Torture Program' (*Opinio Juris*, 01 October 2021) <<https://opiniojuris.org/2021/10/01/prosecutor-de-prioritizes-icc-investigation-of-us-torture-program/>> accessed 04 December 2022.

³⁵⁴ *ibid.*

³⁵⁵ *ibid.*; Arnaud Mafille, 'Whitewashing US crimes in Afghanistan: Why the ICC Must Go' (*Middle East Eye*, 04 October 2021) <www.middleeasteye.net/opinion/afghanistan-us-war-crimes-whitewashing-icc> accessed 04 December 2022.

³⁵⁶ John Reynolds and Sujith Xavier, "'The Dark Corners of the World": TWAAIL and International Criminal Justice' (2016) 14 JICJ 959, 965-979.

³⁵⁷ Trahan, 'Prosecutor De-Prioritizes ICC Investigation of US' (n 353).

³⁵⁸ *ibid.*

squandering ‘potential leverage’ and viewed the move as a ‘misstep’ on the Prosecutor’s behalf.³⁵⁹

Imran Jan criticised the move for being inconsiderate of the conflict context and yielding to US pressure.³⁶⁰ Jan framed this move as negating Bensouda’s ‘bravery’.³⁶¹ Worryingly, Jan implied the US might be using influence behind the scenes to manipulate the ICC, pressuring the ICC to investigate the ‘unfriendly’ *new* Afghan government, the Taliban, and to cease any investigations into alleged US crimes.³⁶² Some stakeholders believed there was an implicit acceptance by elements at the ICC that they would deprioritise allegations implicating the US in return for an end to US hostility.³⁶³ These perceptions suggest that this development will have severe ramifications for some stakeholders’ legitimacy perceptions. Walter Bonné categorised the Prosecutor’s statement as a ‘blow’ to the legitimacy of the ICC and as a ‘historic low’ which could do ‘lasting reputational harm’.³⁶⁴ Bonné believed that Khan’s statement makes the ICC look ‘like a puppet’ institution.³⁶⁵ Nada Kiswanson argued that the Prosecutor breached elements of the Rome Statute and other rules, decisions, and policies, particularly article 54(1), by limiting his investigation to specific groups.³⁶⁶ Julian Elderfield recognised that this decision makes political and practical sense for the ICC in terms of its prospects for successful prosecutions but viewed the decision as damaging to the legitimacy of the OTP.³⁶⁷

Kelebogile Zvobgo categorised this development as a failure and criticised the OTP for ‘letting the United States off the hook’.³⁶⁸ Zvobgo argued that appearing biased can have great importance for the ICC’s legitimacy perceptions which are paramount to its ability to fulfil its

³⁵⁹ *ibid.*

³⁶⁰ Imran Jan, ‘Crimes in Afghanistan: US Enjoys ICC’s Legal Immunity’ (*Daily Sabah*, 19 October 2021) <www.dailysabah.com/opinion/op-ed/crimes-in-afghanistan-us-enjoys-iccs-legal-immunity> accessed 05 December 2022.

³⁶¹ *ibid.*

³⁶² *ibid.*

³⁶³ Walter Bonné, ‘The September Statement by the ICC Prosecutor on Alleged U.S. War Crimes Marks a Historic Low’ (*N.Y.U. Journal of International Law & Politics Blog*, 17 April 2022) <www.nyuilp.org/the-september-statement-by-the-international-criminal-courts-prosecutor-on-alleged-u-s-war-crimes-represents-a-historic-low-point/> accessed 06 December 2022.

³⁶⁴ *ibid.*

³⁶⁵ *ibid.*

³⁶⁶ Nada Kiswanson, ‘Limits to Prosecutorial Discretion: The ICC Prosecutor’s Deprioritisation Decision in Afghanistan’ (*Opinio Juris*, 26 November 2021) <<http://opiniojuris.org/2021/11/26/limits-to-prosecutorial-discretion-the-icc-prosecutors-deprioritisation-decision-in-afghanistan/>> accessed 05 December 2022.

³⁶⁷ Elderfield (n 330).

³⁶⁸ Kelebogile Zvobgo, ‘The ICC’s Flawed Afghan Investigation’ (*Foreign Affairs*, 03 November 2021) <www.foreignaffairs.com/articles/afghanistan/2021-11-03/iccs-flawed-afghan-investigation> accessed 05 December 2022.

potential—stating that the decision was ‘inconsistent’ with the ICC’s aims.³⁶⁹ Douglas Guilfoyle supported Karim Khan’s decision and praised it for its pragmatism.³⁷⁰ Guilfoyle’s argument is credible. However, although the ICC *is* restricted, *inter alia*, by its resources and the political machinations of states, it must not pursue ‘selective justice’.³⁷¹ Guilfoyle and others with this view should not accept the ICC’s corruption. However, Guilfoyle’s commendation of the move may show it was a positive development for the ICC’s legitimacy in his perception. It is pertinent to evaluate what stakeholders’ responses to this development reveal about the ICC’s legitimacy and US credibility in ICJ.

Many stakeholders believe Khan’s office erred here, weakening the ICC’s sociological legitimacy to some extent. The move had some public support, and broadly stakeholders expressed that they were pleased that the ICC would investigate the crimes of the Taliban and Islamic State-Khorasan Province while generally stating regret at the limitations placed on the investigation. Khan’s decision is significant. It dealt a blow to hopes that the ICC may help improve accountability for crimes committed by major powers’ actors.³⁷² The ICC’s legitimacy appears damaged in most stakeholders’ perceptions because of Karim Khan’s strategy.³⁷³ Overwhelmingly, stakeholders’ perceptions suggest that the ‘impression’ will be ‘more one of double standards than pragmatism’.³⁷⁴ Next is an analysis and evaluation of responses to US support for ICC involvement in Ukraine in 2022.

4.8: US support for Ukraine investigation

The final development considered here is the US support for the ICC investigation into the situation in Ukraine. Even though this support has been cautious, it is evident. This development is interesting for the ICC’s legitimacy. Karim Khan welcomed US support for the Ukraine investigation.³⁷⁵ The US appeared to endorse ICC jurisdiction over Russian nationals,

³⁶⁹ *ibid.*

³⁷⁰ Anderson (n 338).

³⁷¹ *ibid.*

³⁷² Zvobgo (n 368).

³⁷³ Anderson (n 338).

³⁷⁴ Zvobgo (n 368).

³⁷⁵ Svetlana Shkolnikova, ‘Congressional Support for International Criminal Court Grows in Wake of Russia-Ukraine War’ (*Stars and Stripes*, 22 April 2022) <www.stripes.com/theaters/europe/2022-04-22/ukraine-russia-war-international-criminal-court%C2%A0congress-5765941.html> accessed 06 December 2022; Nick Schifrin, ‘International Criminal Court Prosecutor on the Pursuit of Justice for Russian War Crimes’ (*PBS*, 22 June 2022) <www.pbs.org/newshour/show/international-criminal-courts-top-prosecutor-discusses-justice-for-russian-war-crimes> accessed 06 December 2022.

which exposed US hypocrisy. Nevertheless, the investigation is warranted and widely supported, bringing opportunities for the ICC to strengthen its legitimacy and support. Reactions to this development are analysed, focusing on how it impacted stakeholders' legitimacy perceptions of the ICC and US credibility in ICJ. First, state officials' responses are analysed.

The Russian response highlights the damage the US has done to perceptions of the legitimacy of the ICC.³⁷⁶ Russian officials can and have pointed to US hypocrisy and the anti-ICC US policies when addressing the Ukraine investigation.³⁷⁷ This response exemplifies why so many stakeholders warned the ICC and the US about the signals this saga sent to other states. While the US essentially demands prosecutorial discretion for international crimes over its nationals, the ICC should be cautious in courting its support. If Prosecutor Khan had not deprioritised alleged US crimes in the Afghanistan situation, observers could reasonably argue that the ICC was attempting to fulfil its mandate. The current situation is a charade. The US had sanctions on ICC staff not two years ago; now, the ICC has tacitly admitted it cannot scrutinise US actions and is courting US support and cooperation in the Ukraine situation.³⁷⁸ Stakeholders' reactions suggest that there is a perceived double standard.³⁷⁹ US officials' responses are considered next.

Undoubtedly, elements in the US would have preferred to keep US policy clear about jurisdiction for non-party states' nationals.³⁸⁰ Nevertheless, there was US support for ICC involvement in Ukraine. Republicans Lindsey Graham and Rick Scott favoured supporting ICC involvement out of apparent pragmatism, viewing the ICC as a suitable avenue to pursue criminal trials against Russians for crimes related to the conflict in Ukraine. Some US politicians emphasised the hypocrisy of the US approach.³⁸¹ Ilhan Omar argued that US

³⁷⁶ Michele Kelemen, 'U.S. Supports Efforts to Prosecute Russians for Alleged War Crimes, including at ICC' (*NPR*, 29 April 2022) <www.npr.org/2022/04/29/1095642542/u-s-supports-efforts-to-prosecute-russians-for-alleged-war-crimes-including-at-icc> accessed 06 December 2022.

³⁷⁷ Hayes Brown, 'Why Biden is Looking to The Hague to Punish Putin' (*MSNBC*, 12 April 2022) <www.msnbc.com/opinion/msnbc-opinion/ukraine-russia-s-war-crimes-need-u-s-help-icc-n1294302> accessed 06 December 2022; Kelemen (n 376).

³⁷⁸ Esti Tambay, 'US Delegation Makes Historic Visit to International Criminal Court' (*Human Rights Watch*, 07 November 2022) <www.hrw.org/news/2022/11/07/us-delegation-makes-historic-visit-international-criminal-court> accessed 06 December 2022.

³⁷⁹ Mason Bissada, 'Top ICC Prosecutor Visits Bucha As Court Investigates War Crimes In Ukraine' (*Forbes*, 13 April 2022) <www.forbes.com/sites/masonbissada/2022/04/13/top-icc-prosecutor-visits-bucha-as-court-investigates-war-crimes-in-ukraine/> accessed 06 December 2022.

³⁸⁰ Kelemen (n 376).

³⁸¹ Shkolnikova (n 375).

opposition to the ICC ‘hampered’ the US ability to support ICC investigations into other situations.³⁸² Omar introduced bills that would, *inter alia*, repeal ASPA; and called on the US to join the ICC.³⁸³ Eight Democrats cosponsored the resolutions.³⁸⁴ André Carson, a US congressman, stated, ‘I believe that joining the ICC now is one of the best ways to achieve accountability for atrocities and violations of human rights’.³⁸⁵ Congresswoman Sara Jacobs supported repealing the laws that limit US cooperation and funding to the ICC.³⁸⁶ These bills did not pass into law. Next, it is beneficial for the analysis to consider the responses of NGOs and civil society actors.

Reed Brody of the International Commission of Jurists warned that the disproportionate focus on Ukraine risks making the ICC appear like ‘the legal arm of NATO’.³⁸⁷ The Coalition for the ICC warned that disproportionate support and attention on the Ukraine situation might risk ‘exacerbating perceptions of politicization of and selectivity in the Court’s work’.³⁸⁸ Brody also warned of the impact of a perception of inequality at the ICC, arguing that such a perception may damage ‘the long-term integrity and global acceptance of the ICC’.³⁸⁹ US policies appear antithetical to fundamental notions of international law derived from Nuremberg, with lineage back to much older notions of fairness and equality as aspects of the rule of law.³⁹⁰ Laurel Fletcher accused the US of ‘selectively deploying’ the ICC.³⁹¹ Fletcher made a link that is a theme recognised in this thesis that ‘U.S. leaders appear to be substantiating Germans’ post-World War II complaints that “Nuremberg was victors’ justice”.³⁹² All that can be said with a degree of certainty is that the US has never consented

³⁸² *ibid.*

³⁸³ Ilhan Omar, ‘In the Wake of Alleged Russian War Crimes, Rep. Omar Introduces Legislation to Join International Criminal Court, Strengthen U.S. Support for International Criminal Justice’ (*Ilhan Omar*, 14 April 2022) <<https://omar.house.gov/media/press-releases/wake-alleged-russian-war-crimes-rep-omar-introduces-legislation-join>> accessed 06 December 2022; Paul Best, ‘Ilhan Omar Says US Must Join International Criminal Court Before It Can Hold Putin Accountable for War Crimes’ (*Fox News*, 18 April 2022) <www.foxnews.com/politics/ilhan-omar-says-us-must-join-international-criminal-court-hold-putin-accountable-war-crimes> accessed 06 December 2022; Shkolnikova (n 375).

³⁸⁴ *ibid.*

³⁸⁵ Shkolnikova (n 375).

³⁸⁶ *ibid.*

³⁸⁷ Reed Brody, ‘The ICC at 20: Elusive Success, Double Standards and the “Ukraine Moment”’ (*Justiceinfo.net*, 30 June 2022) <www.justiceinfo.net/en/102866-icc-20-elusive-success-double-standards-ukraine-moment.html> accessed 06 December 2022.

³⁸⁸ *ibid.*

³⁸⁹ *ibid.*

³⁹⁰ Bob Egelko, ‘U.S. Welcomes International Criminal Court Action Against Putin — But Not Against Itself’ (*San Francisco Chronicle*, 27 March 2022) <www.sfchronicle.com/bayarea/article/The-U-S-welcomes-International-Criminal-Court-17029631.php> accessed 06 December 2022.

³⁹¹ *ibid.*

³⁹² *ibid.*

to an international tribunal with jurisdiction over Americans; a particular demand seems to be that the US requires essentially prosecutorial discretion. The US appears hypocritical, which may damage the field and the institutions the US has an influence over. The US has also had a significant influence in this area historically and influences the ICC, not least through its role as a permanent member of the UNSC.

Oona Hathaway saw the widespread support for ICC involvement in Ukraine amongst states as exhibiting potential for the reinvigoration of the international system.³⁹³ However, the evident double standard may dissuade some from supporting the ICC.³⁹⁴ Zvobgo recognised US hypocrisy in supporting ICC involvement in the situation in Ukraine.³⁹⁵ Many stakeholders argued that this development exposed ‘US double standards’.³⁹⁶ Noam Chomsky pointed out US hypocrisy calling the US ‘the leading rogue state by a huge dimension’.³⁹⁷ The ICC’s legitimacy has been negatively affected in the view of many stakeholders. Many stakeholders’ perceptions suggest the view that the ICC is pro-western and biased, or at least warned the ICC against allowing this legitimacy criticism to continue. Next, responses are analysed and evaluated to determine the impact of this development on stakeholders’ legitimacy perceptions and US credibility in ICJ.

US hypocrisy is plain to see and may dissuade would-be ICC supporters as it may make the ICC appear biased towards NATO, ‘the west’, or the US.³⁹⁸ Oona Hathaway correctly said that the US should support accountability efforts for crimes in Ukraine.³⁹⁹ However, Prosecutor Khan must commit to investigating US crimes under the ICC’s jurisdiction when appropriate; otherwise, there may be untold damage to perceptions of the ICC’s legitimacy.⁴⁰⁰ With

³⁹³ Isaac Chotiner, ‘Can Accountability for Russian War Crimes Exist Without American Support?’ (*The New Yorker*, 07 April 2022) <www.newyorker.com/news/q-and-a/the-shadow-of-international-law> accessed 06 December 2022.

³⁹⁴ *ibid.*

³⁹⁵ Ellen Ioanes, ‘Here’s What the ICC Can Actually Do About Putin’s War Crimes’ (*Vox*, 09 April 2022) <www.vox.com/23017838/international-criminal-court-icc-putin-war-crimes> accessed 06 December 2022.

³⁹⁶ Marjorie Cohn, ‘After Undermining International Criminal Court, US Wants It to Charge Russians’ (*Truthout*, 17 April 2022) <<https://truthout.org/articles/after-undermining-international-criminal-court-us-wants-it-to-charge-russians/>> accessed 06 December 2022; Wang Wenwen, ‘US “War Crimes” Probe Against Russia a Farce’ (*Global Times*, 27 April 2022) <www.globaltimes.cn/page/202204/1260514.shtml> accessed 06 December 2022.

³⁹⁷ Wenwen (n 396).

³⁹⁸ Sara Sirota, ‘U.S. Demands Russian War Crime Prosecution While Neglecting Its Own Accountability’ (*The Intercept*, 11 May 2022) <<https://theintercept.com/2022/05/11/russian-war-crime-prosecution-accountability/>> accessed 06 December 2022.

³⁹⁹ Mohammad Ali Salih, ‘The American Hypocrisy on ICC’ (*Majalla*, 30 April 2022) <<https://eng.majalla.com/node/220081/politicsamerican-hypocrisy-icc>> accessed 06 December 2022.

⁴⁰⁰ *ibid.*; Brody (n 387).

relatively widespread accusations of hypocrisy and double standards and the ICC's apparent capitulation to US pressure, the optics seem particularly damaging to the ICC's legitimacy at this stage.⁴⁰¹ Stakeholders' perceptions reflect this. While less critical elements praise US support for the ICC concerning Ukraine, the overall evidence points to the ICC's sociological legitimacy being generally lessened in the stakeholders' eyes due to this development. Stakeholders' perceptions also suggest that this development further damaged US credibility in ICJ. The US funds much of the Ukrainian defence.⁴⁰² The US position remains unchanged; it supports accountability when accountability suits its goals and interests.⁴⁰³ Finally, the following section finishes the chapter by summarising the analysis.

Conclusion

Prosecutor Bensouda tried to rebuild the legitimacy of the ICC by investigating impartially without fear or favour and signalling to the world that those who commit grave crimes should be punished no matter who they are. This progress may have been destroyed by deprioritising allegations implicating the US shortly before courting US support to investigate Russians. To put it bluntly, the conclusion that the Biden era has seen more damage to the ICC's sociological legitimacy is primarily Karim Khan's responsibility. Stakeholders' responses broadly suggest Khan's deprioritisation of elements of the Afghanistan investigation and the perception that there is a disproportionate focus on the Ukraine investigation are related. The optics are particularly damaging because Khan is British, the United Kingdom and the US are close allies, and the US recently ran a campaign of sanctions and intimidation against the ICC. Many stakeholders' perceptions are that Khan capitulated to this campaign. A scalar assessment of stakeholder responses suggests that the ICC's sociological legitimacy has been damaged due to developments since 2017. Evidence also suggests that US-ICC relations since 2017 have damaged the US credibility in ICJ. The Biden era has so far been more damaging to the legitimacy of the ICC than the Trump era. Biden's administration does not appear to have more commitment to ICJ than the Trump administration.⁴⁰⁴ The Biden administration maintains that the ICC cannot prosecute non-party states' nationals when this is antithetical to US interests.⁴⁰⁵

⁴⁰¹ Egelko (n 390).

⁴⁰² Jonathan Masters and Will Merrow, 'How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts' (*Council on Foreign Relations*, 16 December 2022) <www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts> accessed 19 January 2023.

⁴⁰³ Tambay (n 378).

⁴⁰⁴ Lesotho Times (n 318).

⁴⁰⁵ *ibid.*

Developments in the ICC-US saga since 2017 have further exposed the US position on ICJ. The pattern appears to reveal that the US is pro-accountability for these crimes, essentially, when it can ensure prosecutorial discretion over allegations that may impact US interests.⁴⁰⁶ It seems the US supports investigations where impunity for grave crimes is a complaint that fits a political adversary. The next chapter sets out the key insights taken from this thesis.

⁴⁰⁶ Verma and Simons (n 301).

CHAPTER 5: CONCLUSIONS

The events in the background and context section in chapter one and the timeline in chapter three create a picture of a consistently hypocritical US position on ICJ. Since the First World War, consecutive administrations have not supported an ICJ tribunal with jurisdiction over US nationals without the US having prosecutorial discretion. This thesis provides significant evidence of why the question of US credibility in ICJ was inherently interesting. US policies and actions and responses to them show that the US credibility in ICJ has suffered because of how they have engaged with ICJ and the ICC. This thesis has demonstrated that the US should no longer be considered a leading nation in ICJ. Understanding this and the US's disproportionate influence over the ICC is critical for fully understanding why the events in the timeline had particular relevance to the ICC's legitimacy perceptions.

A review of the literature concerning legitimacy focussing on international governance institutions with a particular focus on the ICC allowed the formation of a delineated framework for assessing the impact of US-ICC interactions since 2017 on ICC legitimacy perceptions. The literature review examined the significance of sociological legitimacy for the functioning of the ICC. The literature review demonstrated the significance of external forces to the legitimacy perceptions of the ICC and set out the scalar legitimacy assessment for chapter four. This scalar assessment was conducive to gaining an insight into the sociological legitimacy of the ICC and was illustrative about why criticisms arise and how to avoid them.

The scalar assessment considered stakeholder responses to significant developments in US-ICC interactions since 2017 and assessed what impact these interactions had on perceptions of the legitimacy of the ICC and on the US credibility in ICJ. The focus was on stakeholder responses, as sociological legitimacy depends on these perceptions.

The thesis suggested that stakeholders' perceptions of the ICC's legitimacy are particularly sensitive to the ICC's judges or Prosecutors appearing to act selectively. We can see that reactions to the PTC II's controversial decision and reasoning of the 12th of April 2019 not to permit the Prosecutors' request to open an investigation into the Afghanistan situation suggest that this development was viewed as negatively impacting the ICC's sociological legitimacy to most stakeholders whose responses were analysed. Karim Khan's decision to deprioritise aspects of the Afghanistan investigation that implicated US nationals or US-backed actors also

damaged most stakeholders' perceptions of the ICC's legitimacy. The fact that the US had sanctions on ICC staff shortly before the deprioritisation decision damaged many stakeholders' perceptions. Evidence that the ICC was encouraging US support for the ICC investigation into the situation in Ukraine shortly after seems to have created the impression with many stakeholders' that the OTP acted selectively and is now acting in line with US interests concerning the Ukraine and Afghanistan investigations in particular. Perceptions of the ICC's independence, impartiality and legitimacy have been damaged.

The ICC may have assisted in exposing US hypocrisy. Stakeholders' responses overwhelmingly suggest that the US credibility on ICJ has lessened due to the events considered. US hypocrisy in ICJ is an ongoing issue, and its origins predate 2017. However, Prosecutor Bensouda's bold decision to seek to investigate all sides in the Afghanistan conflict turned out to be revealing. The Trump administration's vehement and defensive response revealed that even powerful states such as the US are concerned about the significance of being investigated by the ICC and the reputational damage that this could do in international and domestic politics. The ICC has potential. While it lacks enforcement powers, its potential symbolic significance is relevant. The stakeholders' responses also suggest that the ICC and its components and actors' decisions and steps are more important to perceptions of the ICC's sociological legitimacy than was initially assumed. When a state opposes the ICC as the US did in such an overt way, largely stakeholders reiterated their support for the ICC when they viewed the ICC as acting in line with its proscribed processes and within its mandate. Stakeholders' legitimacy perceptions of the ICC were affected negatively, more so when the ICC's actors made decisions viewed as selective.

The US position in practice is that it supports investigations that are conducive to US interests and will attempt to deny the ICC's jurisdiction when ICC scrutiny would be antithetical to US interests. The US has done this by being involved in exempting certain states' nationals from ICC jurisdiction through its role at the UNSC. It has also selectively and inconsistently adopted the position that the ICC does not have jurisdiction over non-party states' nationals, even where the ICC would have jurisdiction under the Rome Statute.

The double standard is clear. The US supported the ICC in exercising its jurisdiction over non-party states' nationals of Sudan, Libya, and Russia. However, the US vehemently denied the ICC's jurisdiction over non-party states' nationals concerning alleged Israeli or US crimes in

situations where the ICC can also establish jurisdiction under the Rome Statute. Therefore, the ICC must be cautious in encouraging US support if it does not wish for further damage to its sociological legitimacy worldwide. There is still time for the ICC, and there is still room for progress. The Afghanistan investigation rumbles on slowly at this stage. More developments are occurring, and the investigation is not static. If Karim Khan were to reprioritise the deprioritised aspects of the Afghanistan investigation, damage to legitimacy perceptions could be addressed. Many lawyers, academics, and activists have called for this outcome. Even the judges suggested the OTP investigate all sides in the PTC's decision to reopen the Afghanistan investigation in October 2022.

The period since 2017 has increased the visibility of the US's hypocritical position; this is due to the US potentially receiving ICC scrutiny about the Afghanistan situation and the widely criticised response of the Trump administration, sanctioning ICC staff. US support for ICC involvement in Ukraine in 2022 exacerbated perceptions of hypocrisy. US policy must change. The US has lost credibility in ICJ. US action through the 'war on terror' and the US refusal to acquiesce to ICC scrutiny has sent a clear message to other states and major powers. The US has signalled that states should only prosecute grave crimes when it is politically expedient to the states' government, which may encourage states to commit abuses. Some Russian responses to the ICC investigation in Ukraine specifically refer to the US policies attempting to interfere with the Afghanistan investigation. The Ukraine invasion has already seen numerous allegations of grave crimes.⁴⁰⁷ The damage the US has done to the ICC in the last five years is significant. They have weakened the ICJ system, and stakeholders' responses overwhelmingly suggest this. As this thesis has shown, scholars and lawyers, such as Walter Bonn , Jennifer Trahan, and Kelebogile Zvobgo, have argued this.

Major policy reversals from the US are not likely at this stage. The ICC must be conscious of these legitimacy criticisms and be cautious with their interactions with the US to avoid further damaging legitimacy perceptions. Unfortunately, many states have refused to cooperate with the ICC. With major powers controlling the UNSC and China, Russia, and the US unlikely to ratify the Rome Statute, the future of the ICC is still being determined. Its ability to fulfil its mandate in the future is far from set. Its record so far is widely criticised. Signalling that major

⁴⁰⁷ UN News, 'War Crimes have been Committed in Ukraine Conflict, Top UN Human Rights Inquiry Reveals' (*UN News*, 23 September 2022) <<https://news.un.org/en/story/2022/09/1127691>> accessed 21 January 2023.

powers actors can commit crimes on state parties' territory without ICC scrutiny is antithetical to the ICC's core aims. Damage to the ICC's sociological legitimacy may lead to more grave crimes, where the only permanent international tribunal with a mandate to investigate these crimes is deemed weak or illegitimate or if many stakeholders openly question its independence and impartiality.

The ICC's sociological legitimacy has suffered due to US-ICC interactions since 2017. Stakeholder perceptions surprisingly suggest the Biden era has done more damage to the ICC than the Trump era, which exhibited open hostility to the ICC. Chapter four showed that the Trump-era measures and rhetoric received much criticism, with stakeholders generally indicating their support for the ICC. Notably, the decision of PTC II on the 12th of April 2019 was criticised by most stakeholders. However, as the decision was reversed on appeal, it is considered an example of the ICC going through its legal processes. Responses to the Appeal's decision indicate that it was mainly considered a positive development for the ICC's legitimacy perceptions. Therefore, legitimacy perceptions could be argued to have largely recovered after the original decision was quashed on appeal.

In contrast, the controversial decision of Karim Khan to deprioritise aspects of the Afghanistan investigation involving US actors and the US support for ICC involvement in Ukraine harmed the sociological legitimacy of the ICC to many stakeholders as they viewed the Prosecutor as acting selectively. Nevertheless, the criticism of Karim Khan's deprioritisation decision and PTC II's decision indicates that the ICC's actors' actions and decisions are paramount to the ICC's legitimacy perceptions. The ICC's components and actors must act impartially and independently in all the situations it is involved. It may be more beneficial to the ICC's aims to investigate the crimes of major powers actors than to ensure the support of a powerful state that keeps itself out of the ICC's jurisdiction by any means. Its core aims should be to combat impunity and promote accountability. It must act in a way that supports the fulfilment of its aims.

The US-ICC relationship since 2017 damaged the ICC's legitimacy and the US credibility in ICJ. The US should repeal ASPA and ratify the Rome Statute. It appears logical that if major powers, particularly the US, ratified the Rome Statute, perceptions of the ICC's legitimacy worldwide would likely improve. The US is unlikely to make these steps at this stage.

Undoubtedly, many would see this as bestowing credibility on the US in ICJ, which could seriously bolster the fight against impunity in the long term.

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