17. 'We will let it die on its own': culture, ideology and power at play between the United States and the ICC

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1. INTRODUCTION

In September 2018, in response to a preliminary examination into alleged United States (US) war crimes in Afghanistan and calls by the Palestine Liberation Organization for an investigation into the actions of Israel,[1] the (now former) US National Security Advisor under the Trump Administration, John Bolton, made a fiery speech aimed at intimidating the International Criminal Court (ICC). A long-time antagonist of the Court, Bolton denounced the 'illegitimate' ICC and threatened sanctions, such as travel bans and asset freezes, and even criminal prosecutions of Court officials.[2] He went on to say: 'We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead.'[3] In response to Bolton's speech, Mark Ellis, executive director of the International Bar Association, lamented that the then-unprecedented attack against the ICC 'is not only in direct contradiction to the principle of accountability for war crimes, but reinforces the Trump Administration's repugnant policy of exceptionalism, where it demands adherence to interna-

[1] In December 2019 the ICC Prosecutor, on conclusion of the preliminary examination of the situation in Palestine and being satisfied that there was a reasonable basis to proceed with an investigation into war crimes, sought a ruling on the scope of the Court's territorial jurisdiction. ICC Office of the Prosecutor, *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine (Situation in the State of Palestine)* ICC-01/18-9 (20 December 2019).

[2] Owen Bowcott, Oliver Holmes and Erin Durkin, 'John Bolton threatens war crimes court with sanctions in virulent attack', *The Guardian* (New York, 10 September 2018) https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech, accessed 11 March 2020.

[3] ibid.

tional law by all countries, except itself'.[4] The deep-seated cultural phenomenon of US exceptionalism,[5] manifested in both law and policy, is especially evident when it comes to shielding the US from any type of oversight concerning serious human rights violations and international accountability processes. This reality of US political and legal culture, grounded on exceptionalism and power politics steeped in nationalism, severely restricts the capacity of the US to engage with the Court and came close to undermining the legitimacy and ability of the Court to investigate and prosecute crimes.

The strained interactions between the US and the ICC are not new.[6] However, this chapter will look at these dynamics in new ways. First, it examines the US–ICC relationship in light of the recent developments under the Trump Administration, whose stance on the ICC has initiated a particularly strong deterioration of US–ICC relations. It begins by briefly outlining US exceptionalism and the historical as well as contemporary relationship between the US and the ICC. It shows how, initially, the problematic relationship had little to do with the relatively minor legal qualms the US government had about the Court's governance and operation, and everything to do with US political and legal culture. It examines the evolving attitudes and (lack of) cooperation between the US and ICC. It shows how concerns around the Court's power over US nationals and the Pre-Trial Chamber's decision declining authorisation of an investigation into the situation in Afghanistan, which was later overturned on appeal, presents a concrete example of the US deploy-

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[4] ibid; more recently, in December 2019, far-right politician, Geert Wilders, the leader of the PVV political party in the Netherlands, called for expelling the ICC Prosecutor, claiming the Court 'behaves as a biased pro-Palestinian institution and an anti-Semitic kangaroo court'. Cnaan Liphshiz, 'Geert Wilders calls for kicking out ICC prosecutor over Israel "bias"', *The Times of Israel* (Jerusalem, 27 December 2019) https://www.timesofisrael.com/geert-wilders-calls-for-kicking-out-icc-prosecutor-over-israel-bias/, accessed 11 March 2020.

[5] This chapter generally uses the term 'US exceptionalism' rather than 'American exceptionalism' because of the understanding that the term 'American' applies beyond the context of the US and includes reference to North and South America. That said, there may be some limited use of the word because colloquially 'American' is still used within the US context to refer to US nationals or US laws.

[6] See Ruth Wedgewood, 'The International Criminal Court: An American View' (1999) 10 European Journal of International Law 93; Diane Marie Amann and MNS Sellers, 'The United States of America and the International Criminal Court' (2002) 50 The American Journal of Comparative Law 381; Kurt Mills and Anthony Lott, 'From Rome to Darfur: Norms and Interests in US Policy Toward the International Criminal Court' (2007) 6 Journal of Human Rights 497; Martijn Groenleer and David Rijks, 'The European Union and the International Criminal Court: The Politics of International Criminal Justice' in Knud E Joergensen (ed), *The European Union and International Organizations* (Routledge 2009) 167.

ing its ideology of exceptionalism to maintain a globalised system of power; a system of power in which the US maintains its unique position as a powerful, and untouchable, actor. Next, using theories of culture and power to revisit and re-examine the dynamics between the US and the ICC, it explores what the deteriorating interactions mean for the Court. It draws on work that addresses the concept of culture in the analysis of power relations, including from political science and anthropology.

The Pre-Trial Chamber's response to hostile actions of the US did not bolster the Court's credibility. Rather, it highlighted the tenuous position of the Court and illustrated that it too can succumb to the power dynamics orchestrated by the US and others. Thankfully, the Pre-Trial Chamber's decision was overruled but the turbulent relationship between the US and ICC remains. It reached a new low in March 2020 when US Secretary of State, Michael Pompeo, named two ICC Prosecutors by name and indicated that they and their families would be targeted by punitive sanctions, and in June 2020 when President Trump issued an Executive Order on Blocking Property of Certain Persons Associated with the ICC. In this evolving context, the chapter returns to the ideas of power and culture in the context of the US–ICC relationship, which raises key questions about the Court's ability to hold individuals from powerful states accountable. The chapter ends by presenting some modest recommendations.

2. CULTURE AND POWER

For the purposes of this chapter, 'culture' is viewed in the singular, connoting a particular culture, namely US legal and political culture, continuously taking shape in the international geo-political context. Culture is seen as consisting of 'socially established structures of meaning'.[7] While US legal and political culture is not static, it does have some common characteristics and values which have helped determine the interests pursued by the US government as a global actor, as well as the legitimate means of pursuing them. More specifically, the cultural phenomenon of US exceptionalism influences views of the law and policy interests of the US government.

Power is defined as 'a social relationship focused on the capacity and the intention of an individual or group to dominate another individual or group'.[8] It is geared towards the exercise of authority and falls on a wide spectrum,

[7] Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 12.

[8] Hans Schoenmakers, 'The Power of Culture: A Short History of Anthropological Theory about Culture and Power' (2012) 4–5, https://www.rug.nl/research/globalisation-studies-groningen/publications/researchreports/reports/powerofculture.pdf, accessed 11 March 2020.

including everything from persuasion to violence. Moreover, although this chapter focuses on how power is enacted and deployed by specific actors, it also takes note of the impactful work that supplements actor-analyses by a more holistic approach that notes that 'power is everywhere', dispersed in knowledge, discourse, and 'regimes of truth'.[9]

This chapter shows how the association between culture and power within the US–ICC relationship has significant consequences for the work of the Court in the wider geo-political environment. The realities of this strained relationship remind us that 'culture is laced with power and power is shaped by culture'.[10] Drawing on the work of Eric Wolf, who is known for his advocacy of Marxist perspectives within anthropology, we can interrogate the role of cultural structures (systems of meaning) in creating and maintaining different structures of power. He theorised that ideas about culture evolve as unifying efforts of dominant groups in order to maintain relations of power.[11] In trying to understand culture and power, Wolf looked specifically at ideas and ideologies. He saw ideas as mental constructions of the world and how it works. Ideas can bring people together (cooperation) or divide them (conflict or contestation).[12] Ideas get linked with power, largely through communication, wherein ideologies are configurations that help deploy power.[13] Ideologies are ideas built around cultural codes designed to control and dominate. In other words, in ideologies, ideas and power come together. Importantly, ideologies have their roots in distinctive cultural histories.

The dominant European cultural understanding and ideology of international law, namely international constitutionalism, posits that 'the fundamental point of international law, and particularly of international human rights law, [i]s to check national sovereignty, emphatically including national popular

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[9] See Michel Foucault, *Discipline and Punish: The Birth of a Prison* (Penguin 1991).

[10] Renato Rosaldo, 'Whose Cultural Studies? Cultural Studies and the Disciplines' in Peter Gibian (ed), *Mass Culture and Everyday Life* (Routledge 1997) 28.

[11] Wolf laid out four ways in which power relates to social relations: (i) the power of potency or capability inherent to an individual; (ii) power as the ability by the individual to impose his will in social action upon another; (iii) tactical or organizational power through which individuals or groups direct or circumscribe the actions of others within determinate settings; and (iv) structural power, organising the settings and specifying the direction and distribution of energy flows. This chapter is especially interested in the last two. See Eric R Wolf, *Envisioning Power: Ideologies of Dominance and Crisis* (University of California Press 1999).

[12] ibid 3–4.

[13] ibid 4.

sovereignty'.[14] The first has to do with a strong distaste for excessive nationalism and the second with concern over popular sovereignty (democratic excess). Closer European integration after WWII led to the creation of supranational bodies, such as the Council of Europe and the European Union, while internationally, there was strong support for the proliferation of human rights bodies to monitor states and the creation of courts to provide accountability for international crimes. One of the courts to emerge out of this movement is the ICC itself.

In contrast, if one looks to the distinctive cultural history of the US, and particularly at what has emerged after WWII, ultra-nationalism and popular sovereignty remain powerful narratives.[15] According to Jed Rubenfeld, US citizens view the victories after WWII (as well as its current military strength) as support for uncompromising US nationalism, US sovereignty and, importantly, US exceptionalism.[16] Broadly speaking, US citizens view their constitution as 'made by the people', and cannot view international law in the same historical light. This construction 'from below' is part of the US exceptionalism ideology.[17] But what exactly is US exceptionalism? The below section explores the ideology of US exceptionalism and what it has come to mean in law and policy at the international level.

3. US EXCEPTIONALISM

US exceptionalism refers to the idea that, because of its unique history, political origins, and place in current world affairs, the US should be seen as qualitatively different from (read: superior to) other nations.[18] US exceptionalism has been the focus of scholarship for decades. Through its discourse and actions, the US sees itself as 'a beacon on a hill', a leader – especially in terms of its economy, moral standards and military power.[19] Because of its special position, it does not feel obliged to be held to the same standards or obligations as other

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[14] Jed Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 NYU Law Review 1971, 1986.

[15] ibid.

[16] Ibid.

[17] David P Forsythe, 'The United States and International Criminal Justice' (2002) 24 Human Rights Quarterly 974, 975.

[18] Harold Hongju Koh, 'On American Exceptionalism' (2003) 55 Stanford Law Review 1479, 1481–82.

[19] See Samuel P Huntington, 'American Ideals versus American Institutions' in John Ikenberry (ed), *American Foreign Policy: Theoretical Essays* (Longman 1999) 221–54; Steven G Calabresi, '"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (2006) 86 Boston University Law Review 1335.

states. As a cultural phenomenon, US exceptionalism is most broadly evident when it comes to the US government's rejection of internationally recognised human rights and supranational checks on sovereignty. What is interesting is that when it comes to human rights, the US often talks about universalism, yet largely practises cultural relativism.[20] This double standard results in much of the world viewing the US as powerful, arrogant and hypocritical.[21]

A number of scholars have tried to break down US exceptionalism, with Michael Ignatieff and Harold Koh being two of the most prominent authors. Ignatieff views US exceptionalism through three aspects:

(i) Human-rights exceptionalism – here the US embraces its own version of civil and political rights but rejects economic, social and cultural rights as embraced by the rest of the world;
(ii) Judicial exceptionalism – here the US rejects the views and influence of any courts outside of the US; and
(iii) US exceptionalism – here the US exempts itself from international norms by either not joining, not complying, or joining with strong reservations.[22]

Similarly, Koh sees US exceptionalism as comprising the following elements:

(i) Distinctive rights – here the US protects certain rights over others (free speech over the right to health);
(ii) The 'use of different labels to describe synonymous' international law concepts (the use of the 'enemy combatant');
(iii) The 'flying buttress mentality' – here the US generally complies with human rights norms but does not join the treaty regime; and
(iv) Double standards – here the US advocates for a different set of rules to apply to itself given what it views as its unique role in global security.[23]

Like Ignatieff and Koh, David Forsythe argues that political exceptionalism comes about when the US argues that because of its special role in the world, as the pre-eminent power enforcing international peace and security, it should

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[20] Forsythe (n 17) 976, noting that 'it is with the US in mind that one can say that a universalist is a relativist with power'; Koh (n 18) 1485–87.

[21] Lawrence Weschler, 'Exceptional Cases in Rome: The United States and the Struggle for an ICC' in Sarah B Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court: National Security and International Law* (Rowman and Littlefield 2000) 85.

[22] Michael Ignatieff, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 3–11.

[23] Koh (n 18) 1483–86.

be treated differently from other states.[24] It explicitly and implicitly makes claims that the US state and its nationals should be exempted from laws that apply to others.[25]

Though some scholars have noted that US exceptionalism is not entirely exceptional since many states claim exceptional status on specific issues,[26] US exceptionalism seems different in two ways. First, US exceptionalism is very unilateralist (accepting few restrictions on policy making). Second, US exceptionalism is fully backed by power politics at all political levels.[27] Power politics is often the 'colloquial phrase for international politics'[28] but it also refers to politics based primarily on the use of power, whether military or economic, as a coercive force.[29] US power in the international order is, in many respects, including militarily and economically, unrivalled – though this is changing. Commitment to power politics together with the deep-rooted ideology and practice of US exceptionalism are two main reasons why the US so strongly opposes the ICC – not the ICC in general, but the ICC having any power over US nationals.[30]

4. THE US AND THE ICC: A COMPLICATED HISTORY

Because it is difficult, if not impossible, to analyse the exercise of power (and political behaviour) of the US vis-à-vis the ICC without describing and analysing the historical and changing cultural context of their relationship,[31] this section will briefly detail their dynamic and complex relationship over the last few decades.[32] Prior to the drafting of the Rome Statute of the ICC,[33] the US appeared supportive of the idea of a permanent international institution to try

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[24] Forsythe (n 17) 983.

[25] ibid.

[26] ibid 978.

[27] ibid 979. In this regard, US exceptionalism may be similar to Swiss exceptionalism, though Switzerland is not a world power and so it has far fewer consequences. Cf Sabrina Safrin, 'The Un-Exceptionalism of US Exceptionalism' (2008) 41 Vanderbilt Journal of Transnational Law 1307.

[28] Martin Wright, *Power Politics* (Continuum 2002) 23.

[29] For a definition of 'power politics', see https://www.merriam-webster.com/dictionary/power%20politics, accessed 23 August 2019.

[30] See Forsythe (n 17).

[31] Schoenmakers (n 8) 5.

[32] John Cerone, 'Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals' (2007) 18 European Journal of International Law 277, 290.

[33] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9 (Rome Statute).

individuals for serious crimes.[34] In 1995, just after the opening of the ad hoc Tribunals for the former Yugoslavia and Rwanda, then-US President Clinton stated that 'nationals all around the world who value freedom and tolerance [should] establish a permanent international criminal court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law'.[35] Later, the US Congress expressed its support for the creation of an international criminal court, urging the US President to support and negotiate at the UN to establish such a court.[36] Yet, as noted by John Cerone, there was a broad spectrum of views amongst US policy makers, with some individuals being more positive than others.[37] Even supporters of the proposed court seemed to agree that the US should be insulated from the effects of the court, reflecting Ignatieff's second category of judicial exceptionalism, Koh's category of double standards, or even Forsythe's political exceptionalism.[38]

Led by then US Ambassador-at-Large for War Crimes Issues, David Scheffer, the US sent the largest delegation to the 1998 Rome Conference where the Rome Statute was negotiated. The US objections to the Rome Statute are generally well known, and centred mainly on how jurisdiction would be triggered and whether US nationals could be exposed to prosecution.[39] Given its veto power within the UN Security Council, the US wanted the Security Council to have control.[40] Alternatively, the US wanted a clear exemption for nationals of non-States Parties.[41] Through negotiation, and even threats of cutting aid,[42] the US sought to gain support for its interests. Both the legal and policy objections plainly show the US ideology of exceptionalism at

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[34] Michael P Scharf, 'Getting Serious about an International Criminal Court' (1994) 6 Pace International Law Review 103, 109. Citing the US Mission to the United Nations, Statement by the Honorable Conrad K Harper, United States Special Advisor to the United Nations General Assembly in the Sixth Committee, USUN Press Release No 171-(93) (27 October 1993).

[35] WJ Clinton, 'Remarks at the University of Connecticut in Storrs' (23 October 1995) 31 Weekly Compilation of Presidential Documents 1840, 1843, https://www.govinfo.gov/content/pkg/PPP-1995-book2/pdf/PPP-1995-book2-doc-pg1595.pdf, accessed 11 March 2020.

[36] US House Joint Resolution 89, 105th Congress, 30 July 1997.

[37] Cerone (n 32) 291.

[38] Amann and Sellers (n 6) 383; see also Monroe Leigh, 'The United States and the Statute of Rome' (2001) 95 American Journal of International Law 124, 126–27.

[39] Amann and Sellers (n 6) 386; Cerone (n 32) 291.

[40] See William Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) 15 European Journal of International Law 701.

[41] Michael Scharf, 'The ICC's Jurisdiction Over the Nations of Non-Party States: A Critique of the US Position' (2001) 64 Law and Contemporary Problems 67, 78.

[42] Cerone (n 32) 291.

play, and power politics at the highest level.[43] Ultimately, however, the US was unsuccessful in ensuring that the ICC could never exercise jurisdiction over nationals of non-States Parties or in ensuring a greater role for the Security Council in triggering or stopping the exercise of jurisdiction.[44]

At the conclusion of the Rome Conference, the US made clear that it was opposed to the Court by voting against its adoption. Although President Clinton signed the treaty in his final days in office in order 'to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come',[45] he had no intention of submitting the treaty to the Senate for ratification.[46] Domestic sentiments against the Court were high. One Republican Senator stated that he wanted to 'make sure that it [the ICC] shares the same fate as the League of Nations and collapses without US support, for this court truly, … is the monster that we need to slay'.[47] Fears were expressed that the Court was 'dangerous' and would require the US to cede its sovereignty, once again stoking sentiments of US exceptionalism.[48]

Under the Bush Administration, US opposition to the Court turned into 'outright hostility'.[49] After the 11 September 2001 terrorist attacks in the US, any notion that the Bush Administration would re-engage with the Court quickly faded. The 'War on Terror', as it became known, reinforced feelings of US exceptionalism within the government.[50] Bush, stating clear US opposition to

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[43] Forsythe (n 17) 982; see also Jamie Mayerfeld, 'Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights' (2003) 25 Human Rights Quarterly 93.

[44] Cerone (n 32) 292; Scharf (n 41).

[45] WJ Clinton, 'Statement on the Rome Treaty on the International Criminal Court' (31 December 2000) 37 Weekly Compilation of Presidential Documents 4, http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf, accessed 17 June 2020.

[46] ibid.

[47] Amann and Sellers (n 6) 386, fn 28; see also John F Murphy, 'The Quivering Gulliver: US Views on a Permanent International Criminal Court' (2000) 34 International Lawyer 45–64; for analysis on Asian states and fears of ceding sovereignty see Chapter 18 in this volume.

[48] Amann and Sellers (n 6) 385. Fear of ceding sovereignty is a common argument used by states against the creation of international courts or monitoring bodies but the US was somewhat unique in its stance of openly supporting the normative idea of an international criminal court (and fighting impunity for serious crimes, for example through support of the ad hoc Tribunals for the former Yugoslavia and Rwanda or the Special Court for Sierra Leone), just not when such a court can exercise control over US nationals.

[49] Martijn Groenleer, 'The United States, the European Union, and the International Criminal Court: Similar Values, Different Interests?' (2015) 13(4) International Journal of Constitutional Law 923, 929.

[50] Cerone (n 32) 294.

the ICC, unsigned the Rome Statute in May 2002 just prior to its coming into force in July. President Bush further sought to undermine the Court by entering into bilateral non-surrender agreements to ensure US nationals would not be surrendered to the ICC.[51] The US pursued these Article 98 agreements worldwide. By 2005, halfway through Bush's two terms in office, the US had over 100 agreements signed, including with States Parties to the ICC.[52]

At the same time, the US Congress enacted the American Service-Members Protection Act (ASPA).[53] This Act also aims to shield US military personnel from ICC jurisdiction and grants broad powers to the US President, including cutting off aid and possible invasion, to ensure US citizens are not detained by or handed over to the ICC. Senator Jesse Helms famously stated that the purpose of ASPA is 'to protect [US nationals] from a UN Kangaroo Court where the United States has no veto'.[54] Indeed, the US used the ASPA legislation on a number of occasions to cut off military aid to various US allies – even at the cost of other policy objectives.[55] Many civil society actors working in the field of international criminal justice were baffled by the overtly harsh stance taken by the US, especially when it came to the detriment of other policy interests.[56] Yet, these actions by the US are simply a reflection of how strong the culture of US exceptionalism is internally in that it is pursued even when arguably detrimental.

A turn came after the revelations of US-orchestrated torture at the Abu Ghraib prison in Iraq and elsewhere, as it became more difficult for the US to exert a 'holier than thou' attitude and maintain explicit antagonism towards the ICC.[57] After the US Congress concluded that genocide was taking place in Darfur, Sudan, the US initially voiced its support for regional solutions.[58] When not enough international support for this approach was forthcoming, the US conceded. For instance, it did not veto the adoption of a UN Security Council resolution referring the situation in Darfur to the ICC. Instead, it abstained from voting, which many saw as a welcome sign of improved rela-

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[51] Judith Kelley, 'Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements' (2008) 101 American Political Science Review 573; Cerone (n 32) 293.

[52] Groenleer (n 49) 930; Cerone (n 32) 296.

[53] Prohibition on cooperation with the International Criminal Court [2002] 22 USCA Section 7423; the Act was dubbed 'The Hague Invasion Act' because it grants the President all means necessary and appropriate to free US citizens and allies from ICC-ordered detention or imprisonment.

[54] US Congressional Record (Senate) S10042 [2 October 2001].

[55] Cerone (n 32) 297, citing numerous countries in South America and Africa.

[56] ibid 298.

[57] ibid.

[58] UNSC Res 1593 (2005), comments by Anne Woods Patterson.

tions.[59] It also supported the ICC premises being used for the Special Court of Sierra Leone trial of Charles Taylor.[60] For many, it appeared that the Bush Administration had softened its approach, if ever so slightly, towards the Court.[61] But this less hostile approach to the ICC was still for situations where others, not US nationals, would potentially be brought before the Court.

The Obama Administration continued with and extended the more softened attitude towards the ICC, engaging more than it ever had before.[62] By this time, the Court was examining situations in the Democratic Republic of Congo (DRC), Uganda and Darfur. In her first speech to the UN Security Council, then US Ambassador Susan Rice commented that the Court 'looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities' committed in those regions.[63] Then US Ambassador-at-Large for War Crimes Issues, Stephen Rapp, later explicitly stated: 'Our government has now made the decision that America will return to engagement at the ICC'.[64] Shortly thereafter, President Obama put together a taskforce to re-evaluate US policy towards the ICC – though he never implemented any of its recommendations.[65] Also, in 2010, the US participated, for the first time, as an observer at the ICC's annual Assembly of States Parties,[66] and sent a delegation to Kampala, Uganda, where negotiations unfolded over the crime of aggression.[67]

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[59] Groenleer (n 49) 931.

[60] Robert McMahon, 'Bellinger Says International Court Flawed but Deserving of Help in Some Cases', *Council on Foreign Relations* (10 July 2007) https://www.cfr.org/interview/bellinger-says-international-court-flawed-deserving-help-some-cases, accessed 11 March 2020.

[61] Cerone believes this had to do with a change of personnel (from hardliners like Helms and Bolton to more moderates) and the fact that the early situations before the ICC were either referred by the UNSC or self-referrals.

[62] Lisa Aronsson, 'Europe and America: Still Worlds Apart on the International Criminal Court' (2011) 10 European Political Science 3, 5; American Society of International Law, 'US Policy Toward to the International Criminal Court: Furthering Positive Engagement' (March 2009) https://iccobservers.files.wordpress.com/2009/03/asil-08-discpaper2.pdf, accessed 11 March 2020.

[63] United States Mission to the UN, Statement by Ambassador Susan E. Rice, US Permanent Representative, on Respect for International Humanitarian Law, in the Security Council, Press Release, 29 January 2009.

[64] 'US to Resume Engagement with ICC', *BBC News* (London, 16 November 2009) http://news.bbc.co.uk/2/hi/8363282.stm, accessed 11 March 2020.

[65] Aronsson (n 62) 8; American Society of International Law (n 62).

[66] See John Crook, 'United States Sends Observers to ICC Assembly of States Parties' (2010) 104 American Journal of International Law 126.

[67] Groenleer (n 49) 932.

In January 2013, President Obama signed into law an updated War Crimes Rewards Program (WCRP), expanding its authority.[68] Under the expanded programme, the US Department of State offered rewards of up to 5 million USD for information leading to the arrest, transfer or conviction of Lord's Resistance Army (LRA) fugitives such as Joseph Kony, Okot Odhiambo and Dominic Ongwen, who all faced ICC warrants for their arrest. In March 2013 the US was faced with an interesting quandary. One of the world's most wanted fugitives, Bosco Ntaganda, handed himself over to the US Embassy in Rwanda, asking to be brought before the ICC where he faced a warrant for his arrest for war crimes and crimes against humanity committed in the DRC in 2002 and 2003.[69] After some political wrangling, the US, with the support of a number of European nations, flew him out of Rwanda to ICC detention facilities in The Hague, where he was found guilty of war crimes and crimes against humanity.[70] The US also supported UN Security Council referrals to the ICC for the situations in Libya,[71] which triggered the Court's jurisdiction, and Syria,[72] which was blocked by Russia and China. Despite all of these positive steps, commentators warned that anyone holding out hope for greater engagement or cooperation would be disappointed.[73] A policy of constructive and mutually beneficial engagement should not be confused by *real* support. A form of 'engaged-exceptionalism' as a policy continued so long as US nationals were not under threat of coming before the Court.

At the time President Trump came into office, the ASPA remained in force and the Rome Statute remained unsigned. More importantly, the US government's distrust of international institutions remained high. From 2017 the US became increasingly vocal in its opposition to any possible ICC investigation into Afghanistan that could look into conduct by US personnel.[74] The alleged acts committed by US armed forces and members of the CIA include torture

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[68] US Department of State Rewards Program Update and Technical Corrections Act of 2012, S.2318, P.L. no 112-283 [15 January 2013].

[69] *The Prosecutor v Bosco Ntaganda* (Decision on the Prosecution Application for a Warrant of Arrest) ICC-01/04-02/06-1-Red-tENG (6 March 2007); for analysis on the *Ongwen* trial see Chapter 8 in this volume.

[70] Phil Clark, *Distant Justice* (CUP 2018) 1–4; *The Prosecutor v Bosco Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019).

[71] UNSC Res 1970 (2011) UN Doc S/RES/1970.

[72] 'Russia, China block Security Council referral of Syria to International Criminal Court', *UN News* (22 May 2014) http://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court, accessed 11 March 2020.

[73] Aronsson (n 62) 5.

[74] The US is also opposed to any possible investigation into Palestine that would examine conduct by Israeli personnel.

and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence.[75] In 2018 the then US National Security Advisor and long-time ICC antagonist, John Bolton, once again denounced the 'illegitimate' ICC. This time, he also took the unprecedented step of threatening sanctions and criminal prosecutions of Court officials for investigations into alleged US war crimes in Afghanistan as well as the actions of the Israeli government.[76]

The shared misgivings between allies of the Court about the Trump Administration's approach to the ICC find their roots in the fear that the US could seriously threaten the existence of the ICC. Prior to Trump's presidency, the US sought to protect its own interests, by signing Article 98 agreements to protect against US civilians being surrendered to the Court, for example, without necessarily trying to discredit the Court internationally. But the 'engaged-exceptionalism' standpoint of the Obama Administration has clearly changed.

Scheffer, who helped negotiate the US position in Rome in 1998, commented that the remarks by Bolton not only 'isolate[d] the United States', but that 'the double standard set forth in his speech will likely play well with authoritarian regimes, which will resist accountability for atrocity crimes and ignore international efforts to advance the rule of law'.[77] In March 2019 the threats became real when Secretary of State Michael Pompeo announced that a visa ban on ICC investigators was in place and threatening additional measures.[78] Besides the visa ban, he stated that the US was 'prepared to take additional steps, including economic sanctions, if the ICC does not change its course' and emphasising that he urged it to do so immediately.[79] In June 2020, President Trump followed through on Pompeo's threats by issuing an unprecedented Executive Order. The actions and discourse from the US have made it

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[75] *Situation in the Islamic Republic of Afghanistan* (Request for Authorisation of an Investigation Pursuant to Article 15) ICC-02/17-7-Red (20 November 2017) para 187.

[76] Bowcott, Holmes and Durkin (n 2).

[77] ibid.

[78] Lesley Wroughton, 'U.S. imposes visa bans on International Criminal Court investigators – Pompeo', *Reuters News* (15 March 2019) https://www.reuters.com/article/uk-usa-icc/u-s-imposes-visa-bans-on-international-criminal-court-investigators-pompeo-idUSKCN1QW1ZH, accessed 29 March 2020; Human Rights Watch, 'US Threatens International Criminal Court' (15 March 2019) https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court, accessed 29 March 2020; Simon Tisdall, 'Trump attack on the ICC is the unacceptable face of US exceptionalism', *The Guardian* (10 September 2018) https://www.theguardian.com/us-news/2018/sep/10/trump-attack-on-icc-is-the-unacceptable-face-of-us-exceptionalism, accessed 29 March 2020.

[79] Wroughton (n 78).

alarmingly clear that US exceptionalism towards the ICC remains grounded in *realpolitik* embraced now by the unpredictable Trump Administration.[80]

The strong exceptionalist discourse propagated by the US can then be rightly conceptualised as an *ideology* in the sense that Wolf theorises, as a configuration of signifiers loaded with cultural meaning about the US as a country with a 'special' status and identity on the world stage; this ideology in turn is used to support and validate direct political actions that seek to uphold and reconfirm existing power structures. Thus, the ideology of US exceptionalism helps the US to control and dominate, both 'outwardly', by putting strong political pressure on other states in the international conversation, and 'inwardly', by reaffirming the US to its citizens as a proud and exceptional nation that refuses to bend to foreign powers. This dynamic became especially pertinent during the ICC Pre-Trial Chamber's deliberation on whether or not to open a formal investigation regarding the situation in Afghanistan, which became a significant juncture in US–ICC relationship when the initial decision seemingly rewarded the hostile actions by the US towards the Court.[81]

5. CULTURE, IDEOLOGY AND POWER INTERTWINED: THE COURT'S REFUSAL TO OPEN AN INVESTIGATION INTO AFGHANISTAN

Wolf was 'interested in how power structures culture'[82] and saw ideologies – ideas developed to manifest power – as key to understanding these concepts. Although focusing on social labour, Wolf's ideas are useful when examining the US–ICC relationship because they reveal how the ideology of excep-

[80] See MD Kielsgard, 'Countervailing US Ideology toward the ICC: American Exceptionalism, Neoconservativism and Protecting America's Interests Abroad' in MD Kielsgard (ed), *Reluctant Engagement: US Policy and the International Criminal Court* (Brill Nijhoff 2010) 202. In November 2019 President Trump took the unprecedented step of pardoning Army First Lieutenant Clint Lorance and Major Mathew Gosteyn for war crimes. Lorance was serving a 19-year sentence for directing soldiers in his command to shoot unarmed civilians. These pardons further signalled his disdain for the rule of law, even within US legal structures. This contempt for the law escalated and in early January 2020, after the killing of Iranian General Qassem Suleimani in a drone strike, President Trump also threatened to destroy Iranian cultural heritage sites – a clear violation of international law if carried out.

[81] *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-33 (12 April 2019). Importantly, the decision would serve as a showdown of sorts between the ICC Prosecutor and the Chambers over which organ was best placed to determine the interests of justice and whether an investigation could lead to a successful prosecution.

[82] John K Chance, 'Book Review, Envisioning Power: Ideologies of Dominance and Crisis' (1999) 21 Culture and Agriculture 29, 29.

tionalism is drawn upon (in both discourse and action) to ensure that the US maintains a privileged position vis-à-vis international actors, including the Court. In line with Wolf's theories, when the US feels threatened, for instance with the prosecution of its nationals, it resorts to its exceptionalist ideology, formed from pre-existing ideas, and carried forward by the political elite to maintain a structure of power. And, while these actions are not unexpected given the Trump Administration and the fact that historically the US and the ICC regularly have their ups and downs depending on the political context at any given time, the real threat to the ICC came from the Pre-Trial Chamber itself, in response to bullying by the US.

Despite the fact that States Parties to the ICC issued a resolution reaffirming their commitment to the Court in December 2018, and the ICC President gave a speech in March 2019 recalling the legacy and role of the US in international criminal justice,[83] the response of Pre-Trial Chamber II to the grandstanding and actions of the US was disheartening. In April 2019, in perhaps one of the most significant decisions in the Court's history, Pre-Trial Chamber II rejected the request by the ICC Prosecution to open an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in Afghanistan.[84] Had this rejection been based on sound legal argumentation, there would have been no need for concern. However, the decision essentially laid the groundwork for recalcitrant states to avoid the Court's jurisdiction by not only failing to cooperate, but by actively undermining the Court.

The opening of a formal investigation allows the Prosecutor to have concrete investigative powers as outlined in the Rome Statute.[85] A formal investigation into a situation also triggers obligations of States Parties to assist in the investigation.[86] In its decision, the Pre-Trial Chamber acknowledged that the Court has jurisdiction and that the situation in Afghanistan would be admissible.[87] However, it declined authorisation based on 'the interests of justice'.[88] The 'interests of justice' argument was a peculiar one. Under the Statute, it is the Prosecutor who can decide not to open an investigation in the 'interests

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[83] Assembly of States Parties to the Rome Statute Resolution 'Strengthening the International Criminal Court and the Assembly of States Parties' (12 December 2018) ICC-ASP/17/Res.5; ICC, 'Chile Eboe-Osuji, ICC President's keynote speech 'A Tribute to Robert H Jackson – Recalling America's Contributions to International Criminal Justice' at the annual meeting of American Society of International Law' (29 March 2019) https://www.icc-cpi.int/Pages/item.aspx?name=190329-stat-pres, accessed 11 March 2020.

[84] *Situation in the Islamic Republic of Afghanistan* (n 81).

[85] Rome Statute (n 33) art 53.

[86] ibid part 9, International Cooperation and Judicial Assistance.

[87] *Situation in the Islamic Republic of Afghanistan* (n 81) 16–28.

[88] ibid 28–31.

of justice' and the Pre-Trial Chamber can review that decision.[89] But that was not the case in this situation. Here, the Pre-Trial Chamber used the 'interests of justice' factor for its own determination of whether to authorise an investigation. Some commentators argued it did so *ultra vires*, or beyond its own legal authority, as this factor is only for the Prosecutor to take into account.[90] Others argued that the Rome Statute allows the Pre-Trial Chamber to assess this factor as well,[91] but that nonetheless, their argumentation around issues of lack of cooperation was faulty.

The Pre-Trial Chamber unanimously found that 'an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame'.[92] It then went on to say that 'an investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure'.[93] The judges outlined three initial factors to consider: (i) the time elapsed between the crimes and investigation; (ii) the prospects of cooperation with relevant actors; and (iii) the likelihood that evidence and suspects would be available; and added two additional points on (iv) available resources and (v) the expectations of victims.[94] Citing relevant political factors in Afghanistan as well as relevant non-States Parties, namely the US, the Pre-Trial Chamber judges concluded that the lack of cooperation, coupled with other shortcomings, meant that in the 'interests of justice' no investigation should go forward.[95]

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[89] Rome Statute (n 33) arts 15(4) and 53(1)(c); ICC Office of the Prosecutor (OTP), 'Policy Paper on the Interests of Justice' (September 2007) https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf, accessed 11 March 2020.

[90] Dov Jacobs, 'ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision' (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 11 March 2020; 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 11 March 2020.

[91] Dapo Akande and Talita de Souza Dias, 'The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice' (*EJIL Talk*, 18 April 2019) https://www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/, accessed 11 March 2020.

[92] *Situation in the Islamic Republic of Afghanistan* (n 81) para 89.

[93] ibid para 90.

[94] ibid paras 91, 95–96.

[95] ibid para 94.

This approach to denying the Prosecutor authorisation to open a formal investigation, which relied on numerous non-legal factors, was shocking to many as it ostensibly rewards non-cooperation from states.[96] Moreover, it is in direct contrast with a 2013 Office of the Prosecutor (OTP) Policy Paper on Preliminary Examinations, stating that '[w]eighing feasibility as a separate self-standing factor … could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention'.[97] The decision specifically mentioned the changes in the political landscape of key, non-states parties to the Statute (the US). It then alluded to the non-cooperation of the US towards the Court when it states that 'suffice it to say that nothing in the present conjuncture gives any reason to believe … cooperation can be taken for granted' and that even minimal cooperation would be challenging and could prove 'trickier' in the framework of an investigation.[98] As a result, it is hard not to read the decision, at least in part, as a reaction that sought to appease US hostility towards the Court.[99]

The ideology of US exceptionalism was deployed in this instance using power politics to intimidate (threats), coerce (visa bans), and pressure (more threats) the judges of the Court into finding a way out of the difficult situation in which the Court found itself. The conclusions of the Pre-Trial Chamber, far from finding a navigable solution, catered not only to the powerful, but also to the obstinate. The logic of the judgment meant that states which refuse to cooperate could create conditions that make an investigation no longer in the

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[96] Patryk I 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) https://www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/, accessed 11 March 2020; Mark Kersten, 'The ICC was wrong to deny prosecution request for Afghan probe', *Aljazeera* (12 April 2019) https://www.aljazeera.com/indepth/opinion/icc-wrong-deny-prosecution-request-afghan-probe-190412101757533.html, accessed 17 June 2020; Amnesty International, 'Afghanistan: ICC refuses to authorize investigation, caving into USA threats' (12 April 2019) https://www.amnesty.org/en/latest/news/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats/, accessed 11 March 2020; Param-Preet Singh, 'In Afghanistan, the ICC Abandons the Field' *Human Rights Watch* (23 April 2019) https://www.hrw.org/news/2019/04/23/afghanistan-icc-abandons-field, accessed 11 March 2020.

[97] ICC OTP, 'Policy Paper on Preliminary Examinations' (November 2013) 17, https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf, accessed 11 March 2020.

[98] *Situation in the Islamic Republic of Afghanistan* (n 81) para 94.

[99] Jacobs (n 90); Kevin John Heller, 'One Word for the PTC on the Interests of Justice: Taliban' (*Opinio Juris*, 13 April 2019) https://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/, accessed 11 March 2020. The internal power struggle between the OTP and the judges was also at play.

'interests of justice' because it would be too difficult to pursue, would take too many resources, and would raise the expectations of victims without a guarantee of success. It is precisely the decision the Trump Administration wanted to see, and likely one welcomed by other antagonists of the Court such as Israel, Myanmar, Philippines, Russia and Sudan. The potentially grave consequences for the Court would have been astounding and go to the heart of the Court's legitimacy and credibility.[100] Heller said it well when he wrote:

> [T]he PTC's decision to reject the Afghanistan investigation solely on the grounds of the 'interests of justice' is profoundly, irremediably, and dangerously wrong. If allowed to stand, it will not only leave the Taliban's many crimes uninvestigated and unpunished, it will also eviscerate the OTP's proprio motu power and encourage states, particularly powerful ones, to be as uncooperative with the ICC as possible.[101]

The precedent set by the US of direct hostility towards the Court serves the interests of individuals associated with uncooperative states around the world where alleged war crimes, crimes against humanity, and genocide have occurred. The culture of US exceptionalism, which often employed the rhetoric of espousing the need for justice for serious crimes (for others) while always shielding US nationals, had been recognised by the Court as a reasonably sound tactic to be used by states to shield their own nationals by ensuring that the 'interests of justice' can never be met.

In June 2019, the Prosecutor requested leave to appeal.[102] Oral arguments were heard in December and the Appeals Chamber handed down its judgment in early March 2020.[103] It concluded that the Pre-Trial Chamber erred in law and that when reviewing a request to authorise an investigation under Article 15(4) it is limited to determining whether there is a reasonable factual basis to proceed with an investigation and whether the potential case(s) would appear to fall within the Court's jurisdiction.

For many Court watchers, the Appeals Chamber judgment fixed a reactionary and dangerous decision of the Pre-Trial Chamber. However, as noted by Bosco, the judgment represents 'a kind of crossing of the Rubicon for the court in its relationship with the United States'.[104] When the Court starts investigating US actions, there will be no turning back. Importantly, the US may

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[100] Rona (n 90).

[101] Heller (n 99).

[102] *Situation in the Islamic Republic of Afghanistan* (Request for Leave to Appeal) ICC-02/17-34 (7 June 2019).

[103] *Situation in the Islamic Republic of Afghanistan* (Judgment on the Appeal) CC-02/17 OA4 (5 March 2020).

[104] Merrit Kennedy, 'International Criminal Court Allows Investigation of US Actions in Afghanistan' (*NPR News*, 5 March 2020) https://www.npr.org/2020/

still raise challenges to the jurisdiction of the Court, but must do so at a later stage. In the meantime, US Secretary of State Michael Pompeo immediately lambasted the judgment as a 'breathtaking action by an unaccountable political institution, masquerading as a legal body'.[105] Later, on 17 March 2020, in the middle of the Coronavirus pandemic, he held a press briefing where he named two ICC Prosecutors investigating the situation in Afghanistan and suggested that he may target them and their families with punitive sanctions.[106] This statement was clearly the US trying desperately to increase its bullying tactics. Within a day, six former US officials denounced the actions, writing '[t]his act of raw intimidation of the Prosecutor's staff members is reckless and shocking in its display of fear rather than strength'.[107] Nevertheless, the attacks did not abate. They only escalated. On 11 June 2020 the President issued an Executive Order claiming that any investigation by the ICC into actions of the US or its allies in the Afghanistan situation constitutes a threat to national security and thus declared a national emergency.[108] Asserting US sovereignty, the Order 'seeks to impose tangible and significant consequences on those responsible for ICC transgressions' through confiscation of property and travel bans. It also prohibits any assistance (through the provision of funds, goods or services) to those targeted by the sanctions, and concludes that there will be no prior notice of a listing to those individuals affected by the Order. Make no mistake, the authorisation of these economic sanctions is a brazen attempt to bully and undermine the Court.

6. LOOKING AHEAD

The US attitude towards the ICC is influenced by many factors, including the preferences and positions of those in power. But whether the person in power is Trump or Obama or someone else entirely, there remains an under-

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03/05/812547513/international-criminal-court-allows-investigation-of-u-s-actions-in-afghanistan?t=1583756390037, accessed 11 March 2020.

[105] ibid.

[106] US Secretary of State, Press Briefing, 17 March 2020, https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/, accessed 20 March 2020.

[107] Todd Buchwald, David M Crane, Benjamin Ferencz, Stephen Rapp, David Scheffer and Clint Williamson, 'Former Officials Challenge Pompeo's Threats to the International Criminal Court' (18 March 2020) https://www.justsecurity.org/69255/former-officials-challenge-pompeos-threats-to-the-international-criminal-court/ accessed 20 March 2020.

[108] US President, Executive Order 13928, Blocking Property of Certain Persons Associated with the International Criminal Court, 11 June 2020, https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/, accessed 12 June 2020.

lying belief in the superiority of the US justice system and in the pre-eminent position of the US globally. This culture or ideology of exceptionalism means that the US government acts as if it should not be seen as similarly situated with other states, and exacerbates a suspicion of international accountability institutions.[109] The legal and political culture in the US is such that it is almost incapable of viewing ICC complementarity in a positive light, namely as a way to encourage good behaviour of states to investigate and prosecute serious international crimes. In this zero-sum way of thinking, only the US should have a say over US nationals. Unfortunately, the US has not taken steps to investigate or prosecute individuals suspected of torture or other serious crimes.

Since the US ideology of exceptionalism is deeply embedded in US government/policy/legal culture,[110] it is highly likely that the US government's reluctance to accept the ICC will remain even after President Trump leaves office. However, the 'engaged-exceptionalism' that formed under the Obama Administration is far preferable for the legitimacy and functioning of the Court to the direct hostility and bullying seen in recent years. States, like the US, do not need to ratify the Rome Statute, as that is their prerogative. However, they should remain committed to ending impunity for serious crimes, recognise and respect that a significant number of states have ratified the Rome Statute and that it is a serious Court, and accept that the best way to avoid nationals being investigated by the Court is to carry out meaningful and effective investigations and prosecutions domestically.

Even with the welcome judgment on appeal, it is probable that many of the conclusions drawn in the Pre-Trial Chamber's Afghanistan decision will play out in fact. The Prosecutor will likely face a lack of cooperation from the US military, CIA or Afghan forces that may lead to either not enough evidence being available to bring specific charges, or an inability to secure the transfer of specific suspects to the Court.[111] These obstacles are part and parcel of the job of a Prosecutor. Indeed, obstacles to investigations and prosecutions happen in national jurisdictions all the time. When these obstacles are encountered, it will be up to the Prosecutor and the President of the Court to undertake political wrangling with States Parties and non-States Parties behind the scenes.

As the situation unfolds, the ICC needs to be aware that it, too, has some exceptionalist tendencies. A number of the concerns expressed by the US against the Court have manifested in reality – though largely against less

[109] Cerone (n 32) 314–15.
[110] Forsythe (n 17) 977.
[111] Though investigations against the Taliban, which constituted the bulk of the crimes alleged in the request to open a formal investigation, would likely not have resulted in these challenges.

powerful states in Africa. Phil Clark argues that the ICC has 'undermined national sovereignty' by pressuring domestic jurisdictions to replicate its form of retributive justice.[112] Rather than adopting a relational understanding of the principle of complementarity, the Court has instead often refused to cooperate with national legal systems either with evidence gathering/sharing, or in providing support to local judiciaries.[113] Through its practice, the ICC has often positioned itself as superior to national jurisdictions. In an attempt to safeguard its so-called objectivity and impartiality, the Court has adopted what Clark refers to as a distanced approach to justice.[114] But this approach is very much underpinned by a desire to dominate and consolidate its position of power.[115] Like the US in many ways, it does not view itself as an equal among judicial institutions or other justice processes. It, too, has 'hegemonic impulses' where a sense of humility in the international arena is lacking.[116] There needs to be both an ideological and cultural shift so that the Court adopts a more attuned approach to international criminal law.

The exceptionalism of the US and the perceived exceptionalism of the ICC are not disconnected. They reflect the intertwined reality of culture and power as it plays out in this specific legal and political context. Undoubtedly, the ICC is facing turbulent times. Given its role in the criminal justice landscape this will probably remain the case for as long as it functions. While there is no easy answer to the complex power struggles that the Court encounters, a better understanding of the intersections of law, culture, ideology and power in its work may help guide it through the more challenging times.

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[112] Clark (n 70) 302.

[113] ibid 302–03.

[114] ibid 303.

[115] ibid 310; Clare Frances Moran, 'The Problem of the Authority of the International Criminal Court' (2018) 18 International Criminal Law Review 883, 901.

[116] See also Chapter 11 in this volume on how the Court employs the notion of 'justice' in its outreach as, arguably, 'justice' can be considered one of the key elements of ICC ideology that it employs to control perceptions of the importance and legitimacy of its work.