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RESEARCH ARTICLE

'Contestation from Within': US Escalating Aversion to the International Criminal Court and the Non-impunity Norm in the Trump Era

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Abstract

Despite the US longstanding opposition, the Trump administration's contestation of the International Criminal Court ('ICC' or 'Court') has been unprecedentedly severe. Not only did it turn against the wholesale legitimacy of the Court, but it ultimately led to sanctions against the ICC Prosecutor and senior prosecution official, while hindering the enforcement of the principle of non-impunity at the international level. Investigating the US stance towards the ICC during the Trump presidency exemplifies one of the most representative moments of what we term a 'contestation from within', hence, a contestation of the Liberal International Order originating from one of its founders, in this case, the US. Drawing on the constructivist literature on norm contestation and a narrative inquiry, this article seeks to explore how the US contestation over the Court and the norm of non-impunity intensified, shifting from applicatory to justificatory, and from discursive to behavioural contestation, specifically, in the Trump era.

Keywords: International Criminal Court (ICC); Trump; Norm contestation; Non-impunity; Sanctions

Introduction

When Donald Trump came to the White House, he did so as an outsider, a businessman without any first-hand experience as a politician. During his presidential campaign, he promoted an electoral programme mainly through nationalist slogans (Restad, 2020), such as "Make America Great Again", while sponsoring US disengagement from multilateralism at the international level (Fehl & Thimm, 2019; Pennanen & Kronlund, 2020). In line with this approach, once elected, Trump withdrew the country from the Paris Agreement, the Human Rights Council, the Trans-Pacific Partnership and then, in the midst of a global pandemic, the World Health Organisation, raising concerns about what role the US would take in the existing international order. Moreover, as will be further explored in this article, the Trump administration vociferously contested the International Criminal Court (hereafter referred as ICC, or "the Court") after the Court's decision to investigate alleged war crimes and crimes against humanity committed by US and NATO personnel in the war in Afghanistan. On that occasion, in 2020, Trump went so far as to sanction the former Prosecutor, Fatou Bensouda, the senior prosecution official, Phakiso Mochochoko, and their families (The White House, 2021). No other US administration had ever got to the point of sanctioning the Court's personnel. Therefore, far from arguing that the US contestation over the ICC is novel, since the seeds of contestation were sown in the

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previous administrations, we claim that Trump aggravated the US dissent and, above all, the contestation against the exercise of the ICC jurisdiction.

Since its adoption in 1998 and entry into force in 2002, the US has never ratified the Rome Statute, which established the ICC. On the contrary, its scepticism towards this body is longstanding, dating back to its incipient phase. Specifically, the George W. Bush administration (hereafter referred as "the Bush administration") signalled his opposition not only by refusing to endorse the Rome Statute but also obstructing the Prosecutor's agenda concerning the investigations into US military activities in the war in Afghanistan through so-called Bilateral Immunity Agreements (BIAs) and the American Service Members Protection Act (ASPA)[1]. BIAs and, more importantly, the ASPA represented a clear case of contestation of the ICC and its role as a supranational institution responsible for guaranteeing respect for the norm of non-impunity. Non-impunity refers to the notion that anyone who has committed crimes amounting to genocide, crimes against humanity, war crimes, and the crime of aggression should be held accountable for their wrongdoing either by the State itself or by the ICC when the former fails to meet its obligations (ICC, 2002, Art. 5). This is a principle that has been turned into an international norm through the ICC foundational treaty, the Rome Statute, to ensure the functioning of the Court itself (Deitelhoff, 2009, p. 151). It follows that by affecting the Court's capability to ensure international justice as an independent supranational body, the application of the non-impunity norm is also contested.

Nonetheless, Bush's contestation towards the Court and the non-impunity norm did not translate into a broad opposition policy to ICC actions as took place under the Trump administration but remained relegated to the case of the investigation in Afghanistan. Indeed, in 2005, the US abstained from vetoing UNSC Resolution 1593, allowing the ICC Prosecutor to investigate any grave crimes committed in Darfur (UN, 2005). Conversely, President Trump escalated the US contestation of the ICC by challenging its integrity while questioning the overall validity of the norm of non-impunity, as epitomised by the imposition of sanctions on the Court's personnel. Sanctions were a full-fledged and direct attack on the Court, whose activities were branded as illegal, and consequently worthy of punitive measures. In addition, Trump depicted the Court as a serious danger to national security, as enshrined in the Executive Order 13982 through which sanctions were implemented (The White House, 2021). The legal basis of this Executive Order can be found in the 1977 International Emergency Economic Powers Act (IEEPA) (US Congress, 1977), which allows the US President "to declare a national emergency with respect to 'any unusual and extraordinary threat'" (Silingardi, 2021, p. 208).

Thus, the position of the US towards the ICC, in particular during the Trump administration, emerged as a highly iconic case of what, in this Special Issue, we term a process of 'contestation from within', i.e., a contestation of the Liberal International Order (LIO) carried out by those countries that have founded and traditionally portrayed themselves as guarantors of such a rules-based order (Adler-Nissen & Zarakol, 2020;

[1] BIAs were negotiated during the Bush administration under Article 98 of the Rome Statute, which affirms that the Court cannot request another State for surrender or assistance when this is inconsistent with its obligations towards a third State (ICC, 2002). This was done "to ensure that states parties would not transfer any US citizens to the court 'without US consent'" (Patrick, 2018, p. 112). The ASPA, in turn, allows the US President 'to take any action necessary' to prevent the ICC from investigating American citizens (U.S. Senate, 2002). ASPA was referred to by Human Rights Watch as the "Hague Invasion Act" because, as Mills and Payne write, it "[…] authorised the United States to use force to 'liberate' US citizens or citizens of allied countries being held by the Court" (Mills & Payne, 2020, p. 406; see also Human Right Watch (2003)).

Börzel & Zürn, 2021)[2]. Although much of the literature focuses on non-Western agency and contestation of the LIO (Bode, 2019; Draude, 2018; Jose, 2018; Newman & Zala, 2018; Stefan, 2016), this analysis suggests that it is not confined to these non-Western countries. On the contrary, the US itself has also contributed to corroding the LIO's legitimacy, selectively questioning institutions and norms perceived to be at odds with its idea of sovereignty. This article therefore contributes to the focus of the Special Issue from a different angle by shedding light on the fact that the LIO and its institutions have also been contested by one of its founders, namely the US. Although the literature has paid scant attention to this issue and has generally dealt with non-Western actors, focusing on the US is relevant because it opens up the debate on the potential fragility of the LIO.

The article proceeds as follows. Section two concerns the theoretical framework of the enquiry, which draws on the constructivist paradigm of International Relations (IR) theory. More specifically, this analysis deals with the constructivist literature on norm contestation to explore the arguments used by the Trump administration to contest the norm of non-impunity and the ICC (Bloomfield, 2016; Deitelhoff & Zimmermann, 2020; Lantis, 2017; Wiener, 2014; Wiener & Puetter, 2009; Zimmermann et al., 2017). Consistent with such a theoretical approach, we distinguish between discursive and behavioural contestation (Stimmer & Wisken, 2019), as well as applicatory and justificatory contestation (Deitelhoff & Zimmermann, 2020), in order to fully understand the modalities, levels, and trajectories of contestation[3]. We argue that discursive contestation can pave the way for behavioural contestation, leading to concrete action, such as the imposition of sanctions in this case. At the same time, drawing on the difference between applicatory and justificatory contestation (Deitelhoff & Zimmermann, 2020), we recognise an intensification of the contestation practices. This turned from questioning the applicability of the jurisdiction of the ICC and non-impunity to the specific case of alleged violations committed by US soldiers in Afghanistan, above all, during the Trump presidency, to disputing their wholesale legitimacy, as evidenced by the sanctions themselves.

As illustrated in section three, it follows an interpretive and qualitative two-stage methodology. In stage one, it proceeds through a content analysis of the discourses of the Trump administration to investigate the mounting discursive contestation. In stage two, it studies the actions (e.g., sanctions) that signal a contestation, or altered understanding, of the ICC and the norm of non-impunity. This methodology allows us to combine discursive and behavioural elements of contestation to not only gain a more comprehensive picture of the Trump administration's contestation of the ICC and non-impunity, but also to illustrate the shift in contestation from the discursive to the behavioural level. In section four, we briefly reconstruct the history of the relationship between the US and the ICC, exploring the reasons for the US longstanding contestation to the ICC. In section five, we examine the intensification of the contesting attitudes of the Trump administration towards the Court and the norm of non-impunity.

The article makes two main contributions, as discussed in the conclusions. On the one hand, in line with the aims of the Special Issue, it examines the US posture over the establishment and operation of the ICC as a case of contestation of the LIO. In this respect, it enriches the discussion by drawing attention to the process of "contestation from within", which the Trump administration's contestation of the ICC and non-impunity

[2] The contribution of this article to the Special Issue can be found in more detail in its Introduction. The Introduction also illustrates the different aspects of contestation, including contestation from within, which this article investigates, as opposed to contestation from outside, i.e., carried out by non-Western actors.

[3] In this respect, discursive contestation refers to "disputes about the meaning, validity, and applicability of norms" expressed through language, while behavioural contestation concerns the "behaviour that undermines or otherwise influences implementation [of norms]" (Stimmer & Wisken, 2019, pp. 518-520).

exemplifies. On the other hand, it also speaks to the literature on norm contestation. By building on the differentiation between discursive and behavioural contestation, as well as between applicatory and justificatory contestation, it delves into the pathways through which contestation practices intensify. Therefore, we observe how under the Trump presidency not only did words turn into actions, as was the case during the Bush administration, but also broadened the scope of contestation from applicatory to justificatory.

Norm contestation: from discursive to behavioural

Constructivism is one of the IR approaches that focus on the impact of international norms on State actors, exploring, among others, the relations between State identity and norms (Finnemore & Sikkink, 1998, p. 902; Katzenstein, 1996; Risse & Sikkink, 1999; Risse et al., 1999). Early institutional constructivists defined norms as "collective expectations for the proper behaviour of actors with a given identity" (Katzenstein, 1996, p. 5). They also conceptualised them as both "regulative", insofar as they set the standard for States' conduct, and "constitutive", as they shape or define the identity of those actors, who reinforce their sense of selves around the values they agree to respect. In particular, early constructivists believed that in the LIO norms directed at guaranteeing respect for human rights have established States' appropriate behaviour, turning into a marker of identity and legitimate membership in such order (Risse & Sikkink, 1999, p. 8). This should be particularly true for Western powers, which have linked their identity to these norms, and especially the US, which has taken the lead in the promotion of liberal values.

Some of these scholars have investigated the role of norm entrepreneurs and postulated the concept of the "norm life cycle" (Finnemore & Sikkink, 1998). It describes a "linear" process that eventually leads to the diffusion of norms through international organisations (Barnett & Finnemore, 2004) and the full acceptance of norms by their recipients via the mechanisms of socialisation and internalisation. Despite its popularity, however, over time this model proved to offer an overly simplistic analysis of norms' formation and diffusion at the international level, assuming that a liberal version of the international order would be ultimately accepted by all States (Hoffmann, 2010). Furthermore, these authors only highlighted the role of norm entrepreneurs, neglecting the possibility that norm-takers may question norms after their spread. Following their logic, Western powers would certainly accept norms inspired by the liberal tradition and then convince other States to conform to international norms by persuading them of their rightness.

Contrary to this view, more recent constructivist scholarship argues that norms may be disputed during their development, considering contestation intrinsic to them (Bloomfield, 2016; Deitelhoff & Zimmermann, 2020; Lantis, 2017; Wiener, 2014; Wiener & Puetter, 2009; Zimmermann et al., 2017). According to this interpretation, contestation concerns the so-called "meaning-in-use" of norms, and their implementation, which depends on the ever-evolving intersubjective beliefs of actors within the international order (Wiener, 2009). Some scholars have therefore emphasised the role of "norm antipreneurs" (Bloomfield, 2016 p. 311; Bloomfield & Scott, 2016) who, as opposed to "norm entrepreneurs" (Finnemore & Sikkink, 1998, p. 895), challenge and resist norms, affecting their meaning and acceptance.

Authors in this field further observe how contestation can have several modes and impacts on the survival of a norm. Stimmer and Wisken (2019) distinguish between "behavioural" contestation, which takes place by means of actions, and "discursive" contestation, which rather occurs through the use of language. In a similar vein, Deitelhoff and Zimmermann (2020, pp. 56-57) differentiate between "applicatory" and "justificatory"

contestation: whereas "applicatory contestation" concerns the application of the norm to a specific situation; "justificatory" relates to the contestation of the overall validity of a norm, which is seen as neither legitimate nor fair on the grounds that it clashes with other established norms. As a result, the latter kind of contestation is thought to potentially lead to the eventual erosion of the norm contested[4]. At the same time, however, Deitelhoff and Zimmermann (2020, p. 58) argue that repeated applicatory contestation may also affect a norm; if a new consensus over the meaning of the norm struggles to be found, it will likely provoke a justificatory contestation.

In this article, we depict the US as an antipreneur actor against the ICC, and in particular, against the norm of non-impunity. We also draw our analysis on the existence of different types of contestation to shed light on the trajectory of intensification of the US contestation of the ICC, in particular during the years of the Trump presidency[5]. In detail, we argue that the US contesting behaviour of the Trump administration has evolved from discursively contesting the jurisdiction of the ICC and the applicability of the non-impunity norm to the specific case of alleged violations of US soldiers in Afghanistan, to full-fledged contestation over their legitimacy, which has also been pursued through actions, in particular, sanctions. While behavioural contestation was also employed by the Bush administration through BIAs and the ASPA, sanctions targeting single individuals working for the Court had never before been imposed. This represented an exacerbation of US opposition towards the Court, whose activities aimed at complying with the rule of non-impunity were considered as if they were illegal – and therefore, the object of punitive measures. This is what made the Trump attitude distinct from that pursued by previous US administrations, and thus merits further study as a crucial case of contestation from within.

Assessing contestation: a two-stage methodology

In order to investigate the evolution of the US contestation of the ICC and the non-impunity norm, this analysis follows a two-stage methodology. First, we identify the core arguments used to discursively dispute the ICC and non-impunity (Heinkelmann-Wild et al., 2021). It lends itself to a content analysis of the narrative released by Trump administration. Narratives permit the understanding of how actors make sense of events and the actions that flow from them, which is useful to decode actors' contestation. A narrative can be defined as a discourse "with a clear sequential order that connect[s] events in a meaningful way [...] thus offer[ing] insights about the world and/or people's experiences of it" (Hinchman & Hinchman 2001, as cited in Hagström & Gustafsson, 2019, p. 390). It makes narrative "an instrument of comprehension [...] by means of which we express our understanding of a given set of events and/or acts, [...] to ourselves and to others, thereby necessarily producing an explanation of it" (Suganami, 1999 as cited in Bode, 2020, p. 353). To conduct such a narrative inquiry, we have systematically investigated all speech acts available, including the official spoken and written statements concerning the ICC, produced and published mainly in the period between late 2017 and late 2019 by President Trump and the key figures of his cabinet. Among them are National

[4] While justificatory contestation represents a direct challenge to the norm under contestation as it discredits its wholesale legitimacy, applicatory contestation may have different consequences on the validity of a norm. Indeed, by better specifying the scope of application to which the norm is to be applied, applicatory contestation can generally lead to a broader acceptance on the part of recipient actors, thus enhancing the overall legitimacy of such norm (Deitelhoff & Zimmermann, 2020, p. 58; Wiener, 2014, p. 34).

[5] Analogously, Deitelhoff (2020, p. 723) has explored the shift from "normal" contestation to backlash in the ICC case in the context of African states, arguing that the lack of change following the applicatory contestation resulted in the intensification of the discourse of contestation to a justificatory level.

Security Advisor John Bolton and his successor Robert O'Brien, Secretary of State Mike Pompeo, Secretary of Defence Mark Esper and the US representative to the United Nations (UN), Nikki Haley.

Second, with regard to behavioural contestation, we explore the actions that interfere both with the authority of the ICC and the implementation of the non-impunity norm, showing an alternative understanding of the norm, if compared with its original meaning resting on sovereignty as responsibility (Stimmer & Wisken, 2019, p. 521). In other words, we identify actions that illustrate a disagreement with how the norm of non-impunity is broadly understood or implemented. Indeed, BIAs, the ASPA, and most importantly the sanctions imposed by Trump have signalled that non-impunity may be contingent on the State's willingness and ability to defend its sovereignty. This showed not only a dissent against the Court, but also an understanding of the non-impunity norm that can arguably impact on the idea that justice can be guaranteed by a supranational court under any circumstances and with respect to any State.

Sources have been selected by following a content criterion. Hence, we select parts of the US texts or speeches in which a contesting discourse against the ICC and the non-impunity norm clearly stood out both in terms of applicatory and justificatory contestation. Then we further distinguish between these two types. We identify the narratives that refer to the applicability of the norm and the jurisdiction of the ICC, like those elaborated to dispute the Court's intention to open an investigation on the US and NATO military personnel for their alleged crimes during the war in Afghanistan. Conversely, we label the speech acts through which Trump and his staff called the Court an illegitimate body, consequently impinging also on its authority to ensure the non-impunity norm, as justificatory contestation.

Consistent with this methodology, the article proceeds by examining the US contestation of the ICC and, consequently, of the non-impunity norm, considering the stance adopted by the Bush administration and above all, that of former President Trump.

The US, the ICC, and the non-impunity norm

First drafted in 1998, the Rome Statute entered into force in 2002, officially establishing the Court as a permanent tribunal and turning non-impunity into a fundamental norm under international law (ICC, 2002). Until that moment, the State had been in charge of investigating and prosecuting criminals for the gravest international crimes, which made its compliance with international law too fragile. Conversely, the establishment of the ICC paved the way for a re-conceptualisation of States' exclusive right to punish perpetrators of grave international crimes by guaranteeing non-impunity at the international level (McDermott, 2019, p. 359).

The ICC is, nonetheless, grounded on the principle of complementarity[6], according to which the State preserves its primary right to conduct investigations and prosecutions. However, whenever the State fails, or is unwilling to do so, the responsibility for

[6] The principle of complementarity is different from that of universal jurisdiction. The principle of universal jurisdiction, indeed, "allow[s] or require[s] a State to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim" (Philippe, 2006, p. 377), while the principle of complementarity is more limited as it specifies that the primary responsibility lies with the State. According to this interpretation of the principle of complementarity, the supranational jurisdiction of ICC does not necessarily collide with the institution of national sovereignty. While the two principles are often confused and those who contest the ICC often claim that it impinges on their national sovereignty, it is important to stress that the principle of complementarity enshrined in the Rome Statute permits States to maintain their national sovereignty by specifying that the primary responsibility for ensuring accountability lies with them.

prosecuting is devolved to the ICC (ICC, 2002, Art. 17). It means that the ICC has affirmed itself as a court of last resort, which has jurisdiction when justice is not achieved at the national level[7]. However, while relying on the complementarity principle, the Court can be granted jurisdiction under a United Nations Security Council (UNSC) referral (ICC, 2002, Art. 13), a proprio-motu initiation of investigations on the part of the Prosecutor (ICC, 2002, Art. 15), or when transgressions have been committed in a State Party, or by a national of such a State, or a State that has accepted the ICC's jurisdiction (ICC, 2002, Art. 12). It follows that, despite respecting the State's primary responsibility, the ICC is an independent institution to the extent that it can initiate investigations without necessarily having the State's consent (Piccolo Koskimies, 2017). Such a "supranational character" of the ICC, and the fact that non-impunity rests on an idea of sovereignty that is conditional to the respect for human rights and may also entail the involvement of this institution, are the main reasons why the US has traditionally been sceptical of the ICC (Patrick, 2018, p. 111). Indeed, while President Clinton signed the Rome Statute to remain engaged in negotiations and limit the scope of application of the Statute (Ralph, 2007, p. 125), the Republican administration of George W. Bush chose not to ratify its final version (Kersten, 2016, p. 6). In particular, the US opposed the fact that the Court is not entirely subjected to the UNSC's scrutiny – as the US had obtained in the 1994 draft of the Rome Statute, which was however not included in the finalised version – but retains several avenues to open investigations (Schabas, 2004)[8]. The US understanding of sovereignty thus remains ingrained in the traditional conceptualisation of sovereignty, as an innate right of the State, rather than as conditioned on the State's responsibility for guaranteeing accountability for grave international crimes (i.e., sovereignty as responsibility)[9]. In so doing, it referred to the idea that the US being a great power in international order that is responsible for global peace and security, its soldiers and personnel should consequently be exempt from ICC jurisdiction (Patrick, 2018; Ralph, 2007, p. 120).

This discursive contestation over the jurisdiction of the ICC was evident in former Secretary of Defence Caspar Weinberger's speech in June 2000:

> We are a superpower. We are a country whose great good fortune and our strength and our resources requires us to bear certain responsibilities. We cannot bear those responsibilities if we are going to have the people who are carrying out these very difficult and dangerous duties for us are subject to prosecution by anyone who does not particularly care for American foreign policy or anyone who does not particularly care for America (US Government Printing Office, 2000)[10].

The statement was at the core of the US mounting contestation of the ICC and illustrates the US opposition to an institution potentially acting without the direct consent of States,

[7] On the State's "responsibility to prosecute" see Turan (2016).
[8] Schabas (2007, p. 24) argues that "exclusion of United States nationals from the jurisdiction of the Court was never a policy objective of the United States when the Statute was being drafted." According to the author, what the US actually wanted, is a UN court subjected to the control of the Security Council. That is, the Security Council determines which cases can be considered by the ICC (Schabas, 2007, p. 25).
[9] On whether the US President chooses to cooperate with the ICC based on US national interests, see Ralph (2007, p.128). Conversely, as Piccolo Koskimies (2017) argues, the ICC rests on the tension between absolute sovereignty and sovereignty as responsibility, meaning that, although States have the primary responsibility for holding perpetrators of grave international crimes accountable, their sovereignty is conditioned on their capability and willingness to ensure justice and the respect for human rights.
[10] Weinberger's quote illustrates that discursive opposition to the ICC was already in place during the Bush administration, which, however, did not assert that the Court was an illegitimate body, as the Trump administration did, thus provoking a justificatory contestation.

even in the circumstances provided by the law. In addition, it shows that the contestation was also directed at the non-impunity norm, insofar as this dictates that national sovereignty cannot be used to shield away from justice.

The US aversion towards the Court further increased in the aftermath of the 9/11 attacks and the beginning of the War on Terror, as BIAs and the ASPA show. Notwithstanding, the Bush administration's actions were more directed at circumventing the ICC's jurisdiction, to both protect US sovereignty and its jurisdiction over its own citizens and argue that the national justice system was fully sufficient to ensure accountability for serious crimes without the interference from any supranational body. Hence, President Bush's discursive and behavioural contestation mostly remained applicatory while a more lenient stance towards the Court was demonstrated in cases that did not involve the US (UNSC Resolution 1693). As Mills and Payne (2020, p. 406) point out, at that stage, the Bush administration "[...] acknowledged that the ICC could be useful for US strategic interests" by using the ICC's jurisdiction as a tool of "coercive diplomacy" (Birdsall, 2010). In other words, the US exploited the Court to oppose, in a non-military way, terrorism-sponsoring and "rogue states like Sudan" (Birdsall 2010, pp. 463-464).

The election of a Democratic government, led by President Barack Obama, did not completely alter the overall position of the US towards the ICC but, in the wake of the 2005 resolution, it turned towards a slightly more cooperative attitude. In 2011, the US even voted in favour of UNSC Resolution 1970 on Libya, which authorised ICC investigations and collaborated with this for the arrest of wanted individuals, in addition to participating in the ICC Assembly of State Parties[11]. The Obama administration's engagement with the Court was also supported at the discursive level. Then Secretary of State Hillary Clinton declared that the US would "end hostility towards the Court", while former US ambassador to the UN Susan Rice declared that the Court "look[ed] to become an important and credible instrument" to hold mass atrocity perpetrators accountable (Birdsall, 2010, p. 464). In the words of Stewart Patrick "the United States ha[d] developed a quiet, pragmatic working relationship with the court [...]" to the point that "by 2016 many international observers regarded the United States as a de facto member of the ICC – albeit one that remained outside of its jurisdiction" (Patrick, 2018, p. 113).

The situation changed again when, starting from late 2017, the Court proposed to open a set of investigations into the crimes allegedly committed by American citizens in the Afghan war. This was a decision that coincided with the advent of Trump at the White House, who made the idea of protecting national sovereignty at all costs and the disengagement of the US from globalism his main direction. As a result, the Trump administration further amplified the US narrative of contestation towards the Court, both at the rhetorical level by portraying it as an illegitimate institution, and at the practical level, by obstructing it through sanctions. Trump exacerbated the contestation both by using a much harsher narrative, directed at undermining the ICC's wholesale legitimacy, rather than its mere jurisdiction, and by limiting the concrete implementation of the non-impunity norm at the international level, keeping the ASPA in force, and hindering the work of Prosecutor Bensouda and her staff.

Evolving contestation: how the Trump administration disputed non-impunity

[11] UNSC Resolution 1970 regarding the referral of the situation in Libya to the ICC practically supported the transfer to the Court of Bosco Ntaganda and Dominic Ongwen, respectively in 2012 and 2015, and included rewards for people collaborating for the arrest of foreign individuals wanted by the ICC (Stromseth, 2019). For more information, see Kersten (2016, pp. 115-143).

With Trump at the US presidency, the insistence on the non-derogation of national sovereignty further intensified (The White House, 2018), fitting rather well with the patriotic and populist narrative of "Make America Great Again" (Rowland, 2019). In his first speech as President at the 72nd United Nations General Assembly (UNGA), Trump uttered the word "sovereign", or "sovereignty" more than twenty times (Trump, 2017). To reiterate the concept, he declared "we will never enter America into any agreement that reduces our ability to control our own affairs" (Trump as cited in Patrick, 2018, p. 9).

Trump's cabinet staff also played a major role in exacerbating the US reticence to cede sovereignty. President Trump was joined by personalities who shared his aversion to international institutions. Among them was National Security Advisor John Bolton, who had matured hostilities towards the ICC during his service in the previous Bush administration. At the same time, Mike Pompeo, designated Secretary of State in mid-2018 to succeed Rex Tillerson, had a negative perception of the Court, sharing Trump's will to disengage the US from participating in multilateral organisations. Such a conglomerate of politicians also included Defence Secretary Mark Esper and US Representative to the UN Nikki Haley. Intolerant of the ICC and led by a populist President with such an unpredictable temperament, the Trump administration therefore exacerbated the US reaction against the ICC, especially when its investigations about the Afghan war began. In November 2017, former ICC Prosecutor Bensouda asked Pre-Trial Chamber for the authorisation to investigate the alleged war crimes and crimes against humanity committed since March 2003 in Afghanistan, involving both Afghan and Taliban forces, as well as US military personnel (ICC, 2017)[12]. Underlying the Prosecutor's request were two main circumstances, enshrined under Articles 12 and 17 of the Rome Statute, which provided its legal foundation. First, Afghanistan is a member State of the ICC, and the alleged crimes were committed within its territory. Second, the US proved unwilling to pursue investigations on this case at home[13]. Nonetheless, despite the formal legality of the Prosecutor's claims, the reaction from Washington against the Court was sharp.

One of the first and most remarkable episodes that epitomised the response of the Trump administration was John Bolton's speech at the Federalist Society on 10th September 2018. Referring to the initiative of the ICC to open investigations regarding US nationals in Afghanistan, Bolton opened his address by saying:

> Today, on the eve of September 11th, I want to deliver a clear and unambiguous message on behalf of the president of the United States. The United States will use any means necessary to protect our citizens and those of our allies from *unjust* prosecution by this *illegitimate* court. (Bolton, 2018, emphasis added)

The investigations were soon narrated as a personal attack on the nation and its soldiers, who sacrificed their lives to counter terrorism, while affirming that ICC investigations contravened the national law, in particular the ASPA. Patriotism, which was a recurrent trope in the political discourse of the Trump administration (Holland & Fermor, 2017),

[12] In April 2019, the authorisation was first rejected by the Pre-Trial Chamber. On the basis of the political changing scene in Afghanistan, "the Chamber believes that, notwithstanding the fact all the relevant requirements are met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited" (ICC, 2019). However, this decision was later overturned by ICC Appeals Chamber in March 2020 (ICC, 2020).

[13] Despite the opening of investigations by the U.S. Department of Justice in 2009 and the Senate Intelligence Committee's summary on the CIA's use of torture against detainees, the Department did not press charges against those responsible for these violations (Human Rights Watch, 2015).

stood out as one of the talking frames to dispute the rightfulness of the ICC investigations, which were thus portrayed as unjust (Bolton, 2018; Trump, 2018; US Department of State, 2020). Furthermore, and more importantly, it was said that neither Afghanistan nor any other State party to the Rome Statute had requested this not just "unfair" but also "illegal" investigation, contravening US federal law (Bolton, 2018). Shortly before Bolton's speech, Nikki Haley had also argued that the activities of the Court would clash with the ASPA (Bolton, 2018; US Government Publishing Office, 2017). This argument was then echoed in a declaration released to the press by Mark Esper, who accused the Court of contravening States' legitimate right to protect their national security. Rather Esper affirmed:

> We expect information about alleged misconduct about our people to be turned over to US authorities so that we could take the appropriate action as we have consistently done so in the past. (Esper in US Department of State 2020)

Such a narrative revealed the applicatory contestation of the US against the Court, which was initially confined to the jurisdiction of the ICC to the specific case. The main arguments revolved around the illegality of the ICC's actions because of the clash with national legislation (in particular the ASPA), the primacy of national security protection, and the precedence of national jurisdiction in line with the complementarity principle. In this respect, by questioning the role that is inherent in the ICC, namely that of complementing domestic justice, it also targeted the application of the norm of non-impunity by making American military personnel internationally unaccountable for their alleged violations.

Within a short time, such applicatory contestation deepened and intensified to the point of turning into a full-fledged justificatory contestation (Bolton, 2018). As early as 2018, Trump and his staff had defined the Court as a "free-wheeling global organisation" pursuing "vague crimes" and had threatened it with eventual sanctions (Bolton, 2018). Nonetheless, contestation was this time addressed at disputing the wholesale legitimacy of the Court, by portraying it as an unfair, unwarranted, and illegitimate institution allegedly violating the core principle of national sovereignty. It involved contesting its existence as an independent international tribunal, responsible for ensuring accountability for grave violations of international law. Such a posture inevitably also questioned the respect of the non-impunity norm.

When, in March 2020, the ICC Appeal Chambers authorised the investigations, the Trump administration depicted the Court as a corrupt, inefficient, and double-sided institution (Pompeo, Barr, O'Brien in US Department of State, 2020). On this note, O'Brien called it a "corrupt and international politicised body", while Pompeo referred to it as "grossly corrupt and ineffective" and a "kangaroo court" (Pompeo, O'Brien in US Department of State, 2020). In the same vein, at the 73rd UNGA Trump said:

> As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority [...] America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism. (Trump, 2018)

Since the Court's requests on the US were not revoked, the Trump administration further ramped up its justificatory contestation, arguing that the Court was a defective judicial body to the point of paving the way for pursuing punitive measures against it. What was initially an applicatory contestation changed to a justificatory one while also shifting from discursive to behavioural. On 11th June 2020, the US issued Executive Order 13928, authorising a set of economic sanctions, visa restrictions, and asset freezes addressing the

ICC Prosecutor, Fatou Bensouda, and a Senior Prosecution Official, Phakiso Mochochoko, because of their "illegitimate assertions of jurisdiction" (Trump in Executive Office of the President, 2020, p. 1). As stated in the Executive Order:

> The United States is not a party to the Rome Statute, has never accepted ICC jurisdiction over its personnel [...] Furthermore, in 2002, the United States Congress enacted the American Service-Members Protection Act [...] which rejected the ICC's overbroad, non-consensual assertions of jurisdiction. [....] These actions on the part of the ICC, in turn, threaten to infringe upon the sovereignty of the United States and impede the critical national security and foreign policy work of the United States Government and allied officials. (Executive Office of the President, 2020)

This episode was evidence of the practical implications provoked by a repeated applicatory contestation as well as a justificatory argumentation, even when it 'only' occurs at the discursive level. The analysis of the narrative adopted by Trump hence unveils an important lesson about the implications of adopting a hostile language as this can eventually turn into actions that constitute a concrete threat to the application and legitimacy of international norms. Despite BIAs and the ASPA during the Bush administration, the US had never challenged the ICC to this extent of imposing *ad personam* sanctions.

Outstandingly, hence, the sanctions pursued by the Trump administrations were applied against individuals within the ICC, involving even their family members, who were forbidden from travelling to the US. The former Secretary of State, Mike Pompeo, explained,

> [...] we cannot allow ICC officials and their families to come to the United States to shop and travel and otherwise enjoy American freedoms as these same officials seek to prosecute the defender of those very freedoms. (Pompeo in US Department of State, 2020)

Such an approach implicitly suggested that analogous provisions would also be imposed on "anyone who dares work for the ICC".

In this regard, we argue, this attitude was mainly the result of President Trump and his staff's tendency to exasperate existing tensions and transform any potential challenge into an enemy of the country, as occurred also with the Court. As Pompeo's statement stresses, the ICC investigations were considered "an ideological crusade against American service members" (Pompeo in US Department of State, 2020) – a rhetoric that eventually echoed that of African States towards the Court with the difference being that this time the most predominant actor within the LIO was the one complaining.

Conclusions: how far has the US contestation gone?

In line with the aim of the Special Issue to analyse the contestation and legitimacy crisis of the LIO from alternative angles, this article has examined a case of 'contestation from within', advanced by one of the founders of this order, namely the US. Hence, it focuses on the role of the US as a contester of liberal institutions and norms, specifically, during the Trump presidency. To do so, it has analysed the Trump administration's contestation over the ICC and the non-impunity norm, both considered fundamental institutions of the LIO for the maintenance of justice at the international level.

In detail, this research contributes to the literature on contestation in two fundamental ways. First, it fills in the gap regarding the oft-overlooked contestation carried out by Western States as it demonstrates that the LIO and its normative framework are not exempt from criticism on the part of its founding States, in this case, the US. Second, it analyses different forms of discursive contestation, casting a new light on the escalation of discourses of contestation and the challenge that narratives can pose to the legitimacy and enforcement of international norms. Therefore, the inquiry differentiates between discursive (including both applicatory and justificatory discourses) and behavioural contestation to provide a clearer picture of the arguments and policies pursued by the Trump administration. As the analysis has shown, contestation intensified from an applicatory discourse, aimed at questioning the jurisdiction of the Court and the applicability of the non-impunity norm to the investigations into the Afghan war, to a justificatory discourse, directed at the legitimacy of the ICC. It eventually culminated in a behavioural contestation through the imposition of sanctions.

The article has also elucidated how discursive contestation, in particular in its justificatory form, can more easily turn into behavioural contestation. Hence, the analysis of US-Court relations adds to the current literature the idea that a justificatory challenge arises as an aggravating factor of the applicatory contestation. This perspective opens a line of research into how contestation can evolve from applicatory to justificatory, as well as from a discursive to behavioural one, more deeply affecting the sustainability of international norms and the order itself. Indeed, although, at least at the narrative level, Biden's administration is seeking to recover from the hostile relations that Trump created with the Court by lifting the sanctions on the ICC (US Department of State, 2021), the US remains sceptical of any international institution impinging on its national sovereignty. In proposing a restrictive interpretation of non-impunity anchored onto absolute sovereignty, the US may inadvertently encourage other States, such as African States (Bower, 2019; Börzel & Zürn, 2021, pp. 295-296) or other non-Western States that do not share a liberal tradition and have no identity link with the international normative framework, to follow suit and disregard the role of the Court and the respect of the non-impunity norm (Bower, 2019, p. 100; Heinkelmann-Wild et al., 2021). At the same time, the US antagonistic stance towards the Court may also influence other Western States. As some authors have recently emphasised, the US contestation of the ICC also posed a problem for the European Union, leading to divergent positions on the matter (Costa et al., 2021). This demonstrates that "Any position the United States takes has ripple effects" (Cleveland, 2021, p. 60) in the field of the protection of human rights and respect for liberal norms.

To conclude, in addition to contributing to the norm contestation scholarship, and in line with the focus of the Special Issue, this article fosters future research on the status and prospects of liberal norms and institutions losing traction and support internationally, especially when such a reverse process is advanced by a Western State that has portrayed itself as guarantor of such order. The hard-to-overcome legacy that Trump left behind and which made the US temporarily abdicate from the role of guarantor of liberal values, indeed, has inevitably posed an obstacle to their preservation (Mills & Payne, 2020), as the case of the ICC and non-impunity illustrates.

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