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FAKE NEWS & INTERNATIONAL CRIMINAL LAW

SARA L. OCHS*

ABSTRACT

In a decade defined by fake news, nations have weaponized disinformation to attack political, legal, and social systems throughout the world. Specifically, in recent years, government leaders have spread fake news about the International Criminal Court (“ICC”) in efforts to turn public opinion against the ICC and deter its attempts to investigate and prosecute controversial cases. Given the ICC’s reliance on state party cooperation, not only does this use of fake news hamper the Court’s likelihood of successfully prosecuting crimes that are of most concern to the international community, but it also promotes a version of history that denies victims both truth and justice. This paper will specifically examine how the governments of the United States and Israel have utilized fake news to deter ongoing ICC investigations into crimes allegedly committed by U.S. and Israeli nationals, and the detrimental effects of these news campaigns. This paper will then identify changes necessary to better protect the ICC—and international criminal law more generally—against fake news campaigns, including the need for greater clarity and widespread global knowledge of the ICC’s powers and jurisdictional reach.

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INTRODUCTION

In a decade defined by fake news, nations have weaponized disinformation to disrupt political, legal, and social systems throughout the world. Specifically, in recent years, government leaders have begun to utilize the media to spread fake news regarding the International Criminal Court (“ICC”) in efforts to deter investigations and prosecutions in politically controversial cases. While fake news poses significant threats to democracy and justice in general, it is specifically damning for the ICC, given the Court’s vulnerable foundations. As a court without a police force or a traditional enforcement mechanism,¹ the ICC is “absolutely, one hundred percent, dependent on effective cooperation with States Parties,”² and in some circumstances, the voluntary cooperation of non-States Parties as well. This reliance on States Parties extends to everything from arresting suspects, to facilitating witness and victim protection, to executing searches and seizures.³ Given this need for State Party cooperation, it is imperative that the ICC enjoy significant perceived legitimacy.⁴

States’ willingness to comply with ICC requests and to assist in investigations correlates directly with their perception of the Court’s credibility and legitimacy.⁵ States Parties and non-States Parties are much more willing to comply with the ICC when they view it as a legitimate institution focused on fair and effective investigations, rather than a biased or politicized entity pursuing its own objectives.⁶ Moreover, the greater the levels of compliance that the ICC receives from States, the greater the likelihood that the ICC Prosecutor will be

1. Danial Kaysi & Charles Faint, *Political Will and Multilateral Cooperation in International Justice: An Interview with Richard Goldstone*, 7 YALE J. INT’L AFF. 90, 91 (2012).

2. H.E. Judge Dr. jur. h. c. Hans-Peter Kaul, Second Vice President Int’l Crim. Ct., Keynote: The International Criminal Court—Current Challenges and Perspectives 8 (Aug. 8, 2011), <https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf>.

3. Rome Statute of the International Criminal Court, arts. 92-93, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

4. In defining “perceived legitimacy,” this essay adopts the definition articulated by Professor Stuart Ford, as “how audiences subjectively perceive the legitimacy” of the ICC. Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT’L L. 405, 406 n.1 (2012).

5. See C. Cora True-Frost, *Weapons of the Weak: The Prosecutor of the ICC’s Power to Engage the UN Security Council*, 44 FLA. ST. U. L. REV. 261, 315 (2016) (recognizing that States’ “perceptions of the ICC’s legitimacy affect their willingness to cooperate with the ICC”).

6. See Yvonne M. Dutton, *Bridging the Legitimacy Divide: The International Criminal Court’s Domestic Perception Challenge*, 56 COLUM. J. TRANSNAT’L L. 71, 77 (2017) (“When levels of domestic [perceived] legitimacy are high, individuals tend to comply, and push others to comply, with institutional orders because they view the norms advanced by their institution as their own.”).

successful in investigating and prosecuting cases.⁷ Thus, the ICC's level of perceived legitimacy has significant impact on the Court's prosecutorial success.⁸

Fake news regarding the Court's operations, its power, and its reach poses a significant threat to the ICC's perceived legitimacy, and by extension, the success of its investigations. Indeed, States subject to ICC investigation have begun to weaponize disinformation to hijack the Court's perceived legitimacy and prevent compliance with its investigations. Most recently, this fake news has revolved around the ICC's jurisdictional reach. Highly publicized criticism has been leveled against the Court by leaders of powerful States subject to the ICC Prosecutor's investigations, labeling the ICC as—among other things—an antisemitic institution,⁹ and an “ineffective, unaccountable . . . outright dangerous,”¹⁰ “kangaroo court,”¹¹ that “violat[es] all principles of justice, fairness, and due process.”¹² This rhetoric is extremely damaging, as it clouds public perception of the ICC and threatens its perceived legitimacy. Not only does this hamper the likelihood of successfully prosecuting crimes that are of most concern to the international community, but it also promotes a version of history that denies victims both truth and justice.

Part I of this essay will briefly recognize the actual jurisdictional limitations imposed on the ICC and the recent decisions by the Court which have clarified its jurisdictional reach. In demonstrating the significance and impact of fake news on the operations of the ICC and the functioning of international criminal

7. *ASP 2017: State Cooperation Crucial for an Effective ICC*, COAL. FOR INT'L CRIM. CT. (Nov. 7, 2017), <https://www.coalitionfortheicc.org/news/20171107/asp-2017-state-cooperation-crucial-effective-icc#:~:text=With%20no%20enforcement%20mechanism%20of,to%20cooperate%20with%20the%20ICC> (highlighting the detrimental impact on investigations of state non-cooperation by explaining the challenges the ICC Prosecutor has faced in investigating crimes within the Situation in Darfur, Sudan).

8. Sara L. Ochs, *Propaganda Warfare on the International Criminal Court*, 42 MICH. J. INT'L L. 581, 582 (2021).

9. Press Release, Israel Ministry of Foreign Affs., Prime Minister Netanyahu's statement regarding the ICC decision (Feb. 6, 2021), <https://mfa.gov.il/MFA/PressRoom/2021/Pages/Statement-by-PM-Netanyahu-regarding-the-ICC-decision-6-February-2021.aspx> [hereinafter Netanyahu Statement Regarding ICC Decision].

10. *Full Text of John Bolton's Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html> [hereinafter *Bolton Speech to Federalist Society*].

11. Reuters Staff, *Pompeo on ICC: U.S. won't be threatened by 'kangaroo court'*, REUTERS (June 11, 2020), <https://www.reuters.com/article/us-warcrimes-afghanistan-trump-pompeo/pompeo-on-icc-u-s-wont-be-threatened-by-kangaroo-court-idUSKBN23I2AJ> (quoting then Secretary of State Mike Pompeo).

12. Donald Trump, U.S. President, Remarks by President Trump to the 73rd Session of the United Nations General Assembly (Sept. 25, 2018), <https://usoas.usmission.gov/remarks-by-president-trump-to-the-73rd-session-of-the-united-nations-general-assembly-new-york-ny/> [hereinafter Trump Remarks to U.N. General Assembly].

law more generally, Part II will present two ongoing case studies in which powerful state governments have utilized fake news pertaining to the ICC's jurisdiction to undermine the legitimacy and functions of the Court. The first will analyze the United States Government's use of fake news in responding to the ICC Prosecutor's investigation into Afghanistan, while the second will detail the Israeli Government's ongoing use of falsehoods to derail the Prosecutor's investigation into crimes committed in Palestine. Part III will argue for the need for greater clarity and widespread global knowledge of the ICC's powers and jurisdictional reach to best combat the fake news to which it is routinely subjected.

I. THE ICC'S JURISDICTIONAL REACH

The ICC's jurisdiction extends only to crimes against humanity, genocide, war crimes, and the crime of aggression,¹³ committed after July 1, 2002, the date on which the Rome Statute entered into force,¹⁴ and—except in cases referred to the Court by the United Nations Security Council¹⁵—committed on the territory or by a national of a State Party.¹⁶ Moreover, these purely jurisdictional restrictions are complemented by additional limitations imposed by the Rome Statute on the type of cases the ICC is authorized to hear.

Even if a case falls within the jurisdiction of the Court, the Rome Statute further requires that the case be deemed admissible for the Court to hear it.¹⁷ This admissibility requirement encompasses two distinct conditions. First, the case must be one that domestic courts are unwilling or genuinely unable to prosecute.¹⁸ This principle of complementarity ensures that the Court acts as “a court of last resort,” as the Rome Statute intended, permitting the ICC to step in only when domestic courts fail to prosecute atrocity crimes that fall within their jurisdiction.¹⁹ Second, the case must be of “sufficient gravity to justify” ICC

13. Rome Statute, *supra* note 3, at art. 5.

14. *Id.* at art. 11. For States which joined the Rome Statute after July 1, 2002, the Court generally will only have jurisdiction over crimes committed in those States' territories or by their nationals which occurred after the Rome Statute entered into force for that State. *Id.* at art. 11(b). Likewise, with regard to the crime of aggression, the ICC only has jurisdiction over crimes committed one year after thirty States Parties' ratification or acceptance of amendments to the Rome Statute pertaining to the crime of aggression. *Id.* at art. 15(2) *bis*.

15. The Security Council may refer a matter involving crimes committed anywhere or by anyone in the world, including crimes committed on the territory of a non-State Party or by a non-State Party national. Dapo Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*, 10 J. INT'L CRIM. JUST. 299, 305 (2012).

16. Rome Statute, *supra* note 3, at art. 12.

17. *Id.* at art. 17.

18. *Id.* at art. 17(1)(a)–(b).

19. *About the Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Jan. 5, 2021); *see also* Rome Statute, *supra* note 3, art. 1 (explaining that the ICC “shall be complementary to

action.²⁰ This gravity requirement, pursuant to which the ICC considers factors including the scale, nature, and impact of the crimes upon which a case is premised, guarantees that the ICC will hear only cases involving “the most serious crimes of concern to the international community as a whole.”²¹

Moreover, the Rome Statute further limits ICC authority by mandating that the Court exercise its jurisdiction over admissible cases under only three circumstances: when a State Party refers a situation to the ICC Prosecutor; when the United Nations Security Council refers the situation to the Prosecutor; or when the Prosecutor initiates an investigation into crimes on his or her own *proprio motu* authority.²² These strict restrictions on the ICC’s reach render it “deferential and non-invasive to its member States, especially those with highly sophisticated and international justice conscious domestic judiciaries.”²³

Several recent decisions have clarified the bounds of the ICC’s jurisdiction, namely as it applies to State Party-referred or Prosecutor-initiated Situations. The first came in 2018 with the Pre-Trial Chamber’s jurisdictional decision in the Prosecutor-initiated Situation in Bangladesh/Myanmar.²⁴ In that decision, Pre-Trial Chamber I determined that it had jurisdiction over the alleged crime of humanity of deportation of Rohingya Muslims from Myanmar—which is not a State Party to the Rome Statute—to Bangladesh—which *is* a State Party.²⁵ The judges reasoned that because an element of the crime of deportation—the crossing of a border—occurred on the territory of Bangladesh, the alleged crime fell within the Court’s jurisdiction.²⁶

Following this decision, the Court also confirmed that it had jurisdiction over nationals of two other non-States Parties, each of which holds significant geopolitical power on the world stage. First, in March 2020, the ICC Appeals

national criminal jurisdictions”); *see also* Akande, *supra* note 15, at 314 (recognizing the ICC as a court is premised upon “principle of complementarity”).

20. Rome Statute, *supra* note 3, at art. 17(1)(d).

21. Rome Statute, *supra* note 3, at art. 5; Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORDHAM INT’L L.J.* 1400, 1450–56 (2009).

22. Rome Statute, *supra* note 3, at art. 13, 15(1).

23. Christopher “Kip” Hale & Maanaska K. Reddy, *A Meeting of the Minds in Rome: Ending the Circular Conundrum of the U.S.-ICC Relationship*, 12 *WASH. U. GLOBAL STUD. L. REV.* 581, 599 (2013).

24. Request Under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Decision on Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.pdf [hereinafter Decision on Bangladesh Jurisdiction].

25. *Id.* at ¶ 73. This conclusion was later reaffirmed by ICC Pre-Trial Chamber III. Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 62 (Nov. 14, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06955.pdf.

26. Decision on Bangladesh Jurisdiction, *supra* note 24, at ¶ 73.

Chamber considered whether the ICC Prosecutor could move forward with a *proprio motu* investigation into war crimes and crimes against humanity committed in Afghanistan, as well as related crimes committed in other States Parties' territories since 2003 by the Taliban and affiliated terrorist groups, the Afghan National Security Forces, and members of the U.S. Armed Forces and Central Intelligence Agency ("CIA").²⁷ With respect to U.S. military and intelligence personnel, then Prosecutor Fatou Bensouda²⁸ sought to investigate alleged war crimes committed both in Afghanistan and at CIA "black sites" in countries including Lithuania, Poland, and Romania.²⁹ The Appeals Chamber ultimately authorized Prosecutor Bensouda to proceed with the investigation, finding that the crimes at issue "may constitute crimes within the jurisdiction of the Court."³⁰ Although this finding in and of itself was largely unremarkable, given that Afghanistan is a State Party to the Rome Statute, its practical impact was significant in that it authorized the Prosecutor to pursue an investigation against nationals of one of the most powerful non-States Parties: the United States.

Then, in February 2021, the ICC's Pre-Trial Chamber I issued a ruling declaring the ICC has territorial jurisdiction over alleged war crimes falling within the open Situation in Palestine.³¹ Palestine had referred the Situation to

27. Situation in the Islamic Republic of Afghanistan, No. ICC-02/17 OA4, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ¶ 4 (Mar. 5, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00828.pdf [hereinafter ICC Appellate Decision on Afghanistan Investigation]. The Appeal Chamber's decision reviewed Pre-Trial Chamber III's April 2019 decision rejecting Prosecutor Bensouda's request to proceed with an investigation into Afghanistan. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Decision Pursuant to Article 15 of the Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.pdf.

28. Prosecutor Fatou Bensouda of The Gambia concluded her nine-year tenure as ICC Chief Prosecutor on June 16, 2021, and was replaced in this role by International Lawyer and UK Barrister Karim Khan. *Karim Khan sworn in as new ICC chief prosecutor*, DEUTSCHE WELLE (June 16, 2021), <https://www.dw.com/en/karim-khan-sworn-in-as-new-icc-chief-prosecutor/a-57916216>.

29. David J. Scheffer, *The ICC's Probe into Atrocities in Afghanistan: What to Know*, COUNCIL ON FOREIGN REL. (Mar. 6, 2020, 3:03 PM), <https://www.cfr.org/article/iccs-probe-atrocities-afghanistan-what-know>.

30. ICC Appellate Decision on Afghanistan Investigation, *supra* note 27, at ¶ 62. The Appeals Chamber specifically authorized the Prosecutor to investigate alleged war crimes related to the Afghanistan situation even when the capture of a victim and the alleged criminal act occurred outside Afghanistan. *Id.* at ¶ 76. However, the Court was cautious to note that to determine whether the ICC had jurisdiction over these specific crimes "a careful analysis of the circumstances of each case will need to be carried out to establish whether there is a sufficient nexus" to the armed conflict in Afghanistan. *Id.*

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

the ICC Prosecutor, who, following a preliminary examination, concluded there existed a reasonable basis to believe war crimes were committed in the 2014 Gaza Conflict and near the border fence between the Gaza Strip and Israel beginning in March 2018.³² In January 2020, Prosecutor Bensouda requested, pursuant to Rome Statute article 19(3), that the Pre-Trial Chamber issue a ruling clarifying the scope of the Court's jurisdiction in the Situation in Palestine, and specifically whether it extended to the Israeli-occupied portions of Palestine.³³ By relying on Palestine's status as a non-member observer state in the United Nations and its 2015 accession to the Rome Statute, the Pre-Trial Chamber concluded that Palestine is a State Party to the Rome Statute.³⁴ As such, it determined the Court has authority to exercise jurisdiction over Occupied Palestinian Territory, including Gaza—which encompasses East Jerusalem—and the West Bank.³⁵

These two latter decisions sparked immediate backlash from the United States, Israel, and several of their allies and prompted an onslaught of fake news about both the Court's authority and its jurisdictional reach.

II. FAKE NEWS & FAKE JURISDICTION

Disinformation campaigns against the ICC are not new.³⁶ Yet, the recent decisions finding that ICC jurisdiction extends to crimes committed by nationals of powerful non-States Parties has generated fake news campaigns against the ICC by the United States and Israel. These campaigns involve highly publicized statements made by U.S. and Israeli leaders and the dissemination of anti-Court propaganda misrepresenting the ICC's authority, intent, and jurisdiction in efforts to weaponize public opinion against the Court. Both the fake news campaigns initiated by the United States and Israel pose significant concerns to the ICC's effectiveness given the Court's extreme reliance on perceived legitimacy.

A. *The United States & The Investigation in Afghanistan*

Even before the ICC authorized the Prosecutor's investigation into Afghanistan, the United States Government, under the Trump Administration,

https://www.icc-cpi.int/CourtRecords/CR2021_01165.pdf [hereinafter Pre-Trial Chamber Decision on Jurisdiction in Palestine].

32. Situation in the State of Palestine, ICC-01/18, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ¶¶ 94–96 (Jan. 22, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00161.pdf.

33. *Id.* at ¶¶ 18–20.

34. Pre-Trial Chamber Decision on Jurisdiction in Palestine, *supra* note 31, at ¶¶ 109–113.

35. *Id.* at ¶ 60.

36. *See* Ochs, *supra* note 8, at 592 (detailing the “propaganda war” leveled against the ICC by Kenya in response to the Court's indictments of Uhuru Kenyatta and William Ruto, the current President and Deputy President of Kenya).

had taken decisive action against the ICC, utilizing the media to launch a fake news campaign aimed to discredit the Court. Interestingly, the Trump Administration's public defense did not proclaim U.S. troops' innocence in committing alleged war crimes, but instead spread widespread disinformation about the Court's jurisdictional reach.

In September 2018, several months after Prosecutor Bensouda filed her request to open the investigation in Afghanistan, then National Security Advisor John Bolton gave a widely publicized speech to the Federalist Society in which he lambasted the ICC as a "free wheeling global organization" that claimed "automatic jurisdiction" over crimes with "disputed and ambiguous definitions."³⁷ Bolton's statements were supplemented both by the United States Government's revocation of Prosecutor Bensouda's entry visa into the United States³⁸ and by repeated claims from high-ranking U.S. leaders, including then Secretary of State Michael Pompeo and President Donald Trump, exaggerating the reach of the ICC's jurisdiction.³⁹ For instance, in a speech before the United Nations General Assembly in 2018, President Trump falsely declared that the ICC "claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process,"⁴⁰ a statement which is categorically false, as evidenced by the limitations imposed by the Rome Statute.

Following the ICC Appeals Chamber's ruling authorizing Prosecutor Bensouda's investigation, the Trump Administration amplified its use of fake news with significant action. After Secretary Pompeo publicly denounced the ICC as an "unaccountable political institution masquerading as a legal body,"⁴¹ President Trump signed an Executive Order on June 11, 2020, which declared a national emergency arising from the "unusual and extraordinary threat to the national security and foreign policy of the United States" posed by the ICC's investigation of U.S. personnel.⁴² In light of this national emergency, the Executive Order authorized the imposition of sanctions against ICC personnel

37. *Full Text of John Bolton's Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html>.

38. *Bolton Speech to Federalist Society*, *supra* note 10.

39. *See e.g.*, Trump Remarks to U.N. General Assembly, *supra* note 12; News Wires, *US bars entry to ICC investigators, says 'attacking America's rule of law'*, FRANCE 24 (modified Dec. 4, 2019, 7:44 PM), <https://www.france24.com/en/20190315-usa-icc-investigators-afghanistan-pompeo> (detailing a speech by Secretary of State Pompeo in which he described the ICC as having "broad unaccountable prosecutorial powers," and pursuing "politically motivated prosecution of Americans").

40. Trump Remarks to U.N. General Assembly, *supra* note 12.

41. Press Statement, Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, ICC Decision on Afghanistan (Mar. 5, 2020), <https://2017-2021.state.gov/icc-decision-on-afghanistan/index.html>.

42. Exec. Order No. 13928, 85 Fed. Reg. 36,139 (June 11, 2020).

and those non-U.S. nationals who assisted the ICC in its investigation into Americans.⁴³ On September 2, 2020, Secretary Pompeo formally announced the issuance of sanctions pursuant to the Executive Order against Prosecutor Bensouda and Phakiso Mochoko, the ICC's Head of Jurisdiction, Complementarity and Cooperation Division, which had the effect of freezing any assets they had in or which transferred through the United States.⁴⁴

While the controversial Executive Order has since been revoked by current President Joseph Biden, with the effect of terminating the national emergency and lifting sanctions, the Biden Administration has maintained its opposition to the ICC's Afghanistan Investigation.⁴⁵ Specifically, in revoking the Executive Order, President Biden wrote that the United States sustains its objections to the ICC's "assertions of jurisdiction over personnel of such non-States Parties as the United States and its allies absent their consent or referral by the United Nations Security Council."⁴⁶

Yet, the text of the Rome Statute, with which the United States Government is undoubtedly familiar, having initially signed the treaty under the Clinton Administration, despite not ratifying and incorporating it into U.S. domestic law,⁴⁷ clearly disputes both the Trump Administration's and President Biden's categorization of the ICC. United States nationals allegedly committed war crimes on the territory of Afghanistan, a State Party to the Rome Statute, and in doing so, rendered themselves susceptible to ICC jurisdiction. Moreover, the United States could avoid ICC prosecution by conducting a domestic investigation and prosecution of its own officials, thereby preempting the Court from moving forward in cases against U.S. nationals pursuant to the

43. *Id.*

44. *Blocking Property of Certain Persons Associated with the International Criminal Court Designations*, U.S. DEP'T OF TREASURY (Sept. 2, 2020), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20200902>; Laurel Wamsley, *Trump Administration Sanctions ICC Prosecutor Investigating Alleged U.S. War Crimes*, NPR (Sept. 2, 2020, 6:27 PM), <https://www.npr.org/2020/09/02/908896108/trump-administration-sanctions-icc-prosecutor-investigating-alleged-u-s-war-crim>.

45. Press Release, The White House, Executive Order on the Termination of Emergency with Respect to the International Criminal Court (Apr. 1, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/01/executive-order-on-the-termination-of-emergency-with-respect-to-the-international-criminal-court/>.

46. *Id.*

47. While President Bill Clinton signed the Rome Statute, he later recommended that his successor, President George W. Bush not submit the statute to the Senate for ratification. Press Release, William J. Clinton, U.S. President, Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), <https://www.govinfo.gov/content/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf>. President Bush complied with the recommendation, and in 2002, John Bolton, in his role as U.N. Ambassador under President Bush, wrote to U.N. Secretary General Kofi Annan, expressing the United States' intent to "unsign" the Rome Statute. *See* Letter from John R. Bolton, Under Sec'y of State for Arms Control & Int'l Sec., to Kofi Annan, U.N. Sec'y Gen. (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

complementarity principle. Yet, the United States has still failed to do so.⁴⁸ Instead, U.S. leaders and government officials have engaged in widespread rhetorical attacks against the Court, misrepresenting the Court's jurisdiction and intent in front of a U.S. audience that is relatively uninformed about the ICC's procedural reach.

B. Israel & The Situation in Palestine

Like the U.S. response to the Afghanistan investigation, Israeli authorities' reactions to the ICC Pre-Trial Chamber's February 2021 ruling finding jurisdiction over alleged crimes committed within the Palestine Situation were swift and aggressive. In a public video released shortly after the Pre-Trial Chamber issued its opinion, Prime Minister Benjamin Netanyahu denounced the ICC's ruling as "pure antisemitism."⁴⁹ He complained that the Court displayed double standards by pursuing investigations into alleged Israeli crimes while "refus[ing] to investigate brutal dictatorships like Iran and Syria," and denounced the ICC as "targeting the one state of the Jewish people."⁵⁰ His comments were echoed by other Israeli officials, including Israeli Foreign Minister Gabi Ashkenazi who declared that the Pre-Trial Chamber's decision turned the ICC "into a political tool of anti-Israel propaganda."⁵¹

On March 3, 2021, following the Pre-Trial Chamber's jurisdictional ruling, Prosecutor Bensouda issued a statement confirming the Office of the Prosecutor's opening of an investigation into the Situation in Palestine.⁵² In her announcement, Prosecutor Bensouda made clear that her office intended to work to "establish accountability and deliver justice for the Palestinian *and* Israeli victims of crimes covered by the Rome Statute."⁵³ Israeli authorities responded to the announcement by launching another wave of fake news.

The continued campaign of fake news included the creation of a website, ostensibly created by the Israeli Ministry of Strategic Affairs, which opens with a webpage declaring the ICC as having "No Standing. No Jurisdiction. No

48. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7-Conf-Exp, Public redacted version of Request for authorization of an investigation pursuant to article 15, ¶ 296 (Nov. 20, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_06891.pdf (noting that as of 2017, Prosecutor Bensouda was "unable to obtain specific information or evidence with a sufficient degree of specificity and probative value that demonstrates that proceedings were undertaken with respect to cases of alleged detainee abuse by member of the US armed forces in Afghanistan.").

49. Netanyahu Statement Regarding ICC Decision, *supra* note 9.

50. *Id.*

51. Lazar Berman, *Facing possible ICC probe, Israel still has options before judgment day*, TIMES ISRAEL (Feb. 7, 2021, 10:51 PM), <https://www.timesofisrael.com/facing-possible-icc-probe-israel-still-has-options-before-judgment-day/>.

52. Press Release, ICC, Statement by the ICC Prosecutor, Ms. Fatou Bensouda, on an investigation into the situation in Palestine (Mar. 3, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine&ln=fr>.

53. *Id.* (emphasis added).

Case.”⁵⁴ Rather than providing an overview of the ICC’s jurisdictional principles and detailed reasoning of the Pre-Trial Chamber’s decisions finding ICC jurisdiction over Occupied Palestinian Territories, the website repeatedly denounces the ICC as a tool of anti-Israeli groups and declares the Pre-Trial Chamber’s jurisdictional decision as having the effect of “transforming [the ICC] from a legal body to a political one.”⁵⁵

Compounding these false, public assertions, the Israeli Government, under no uncertain terms, made clear it would not cooperate with the Prosecutor’s investigation into the Palestinian Situation and urged its allies to do the same.⁵⁶ Public statements by Israeli state leaders continue to paint the investigation as “antisemitic,” hypocritical, and “morally bankrupt.”⁵⁷

Like the United States, Israel has not prosecuted its nationals for the alleged war crimes being investigated, nor has its government expressed any intent to do so. Instead, in addition to refusing to cooperate in any way with the ICC Prosecutor’s investigation, Israel has sought to destroy the Court’s reputation and legitimacy, by portraying it as a racist, politicized mechanism, rather than one intended to bring accountability for those victims for whom justice would otherwise remain elusive.

III. COMBATING FAKE NEWS THROUGH KNOWLEDGE

Both the United States and Israel responded to the ICC’s potential threat of prosecution by targeting the Court where it is weakest: by undermining its legitimacy. As noted previously, as a court which relies heavily on the cooperation of its States Parties and non-States Parties—in those situations involving crimes committed by nationals or on the territories of non-States

54. *ICC: No Standing. No Jurisdiction. No Case.*, ICC JURISDICTION, <https://icejurisdiction.com/#icc> (last visited May 26, 2021).

55. *Id.*

56. Press Release, Prime Minister’s Office, PM Netanyahu Holds Discussions on Israeli Policy regarding the Statement of the International Court in The Hague on the Opening of an Investigation against the State of Israel (Apr. 8, 2021), https://www.gov.il/en/Departments/news/spoke_court080421 (referring to a letter sent to the ICC Prosecutor by an Israeli inter-ministerial team noting Israel’s intent not to cooperate with the investigation and presenting its position that the Prosecutor is acting without jurisdictional authority); Press Release, Israel Ministry of Foreign Affs., FM Ashkenazi on ICC announcement regarding the initiation of an investigation (Mar. 3, 2021), <https://mfa.gov.il/MFA/PressRoom/2021/Pages/FM-Ashkenazi-on-ICC-announcement-3-March-2021.aspx> [hereinafter Ashkenazi Announcement on ICC Investigation].

57. Ashkenazi Announcement on ICC Investigation, *supra* note 56; Press Release, Israel Ministry of Foreign Affs., Remarks by PM Netanyahu on the ICC Decision (Mar. 3, 2021), <https://mfa.gov.il/MFA/PressRoom/2021/Pages/Remarks-by-PM-Netanyahu-on-the-ICC-Decision-3-March-2021.aspx>; Press Release, Israel Ministry of Foreign Affs., President Rivlin comments on the International Criminal Court Decision (Mar. 3, 2021), <https://mfa.gov.il/MFA/PressRoom/2021/Pages/President-Rivlin-comments-on-the-International-Criminal-Court-decision-3-March-2021.aspx>.

Parties—it is critical that the Court be widely perceived as a neutral, competent, and effective judicial mechanism.⁵⁸ Repeated and highly publicized claims misrepresenting the Court’s jurisdictional power and intentions from the United States, one of the most powerful nations in the world, and Israel, one of its primary allies, presents a significant threat to the ICC’s perceived legitimacy both in States Parties and non-States Parties. This is especially so given the lack of widespread knowledge regarding the Court’s mandate and its jurisdictional limitations.

A 2018 survey conducted by Ipsos made clear the lack of knowledge about the Court among the American public. Only forty-five percent of 1,004 Americans polled in the survey were aware of the existence of the ICC.⁵⁹ Of those who admitted awareness, relatively few had a basic knowledge of the ICC, with sixty-two percent incorrectly believing that the United States is a State Party to the Rome Statute.⁶⁰ Likewise, in another 2018 study of 1,020 Americans, half of the participants admitted to having no knowledge of the ICC, and the survey creator recognized that those participants who admitted to having knowledge were not “deeply familiar with the Court.”⁶¹ And while both of these studies reveal American ignorance when it comes to the ICC, this lack of knowledge extends internationally as well. While public opinion data regarding the International Criminal Court is limited, surveys conducted in countries like Uganda and the Central African Republic—States Parties to the Rome Statute and countries in which the ICC had been actively investigating and prosecuting crimes—reflect that relatively little is known by the general public about the ICC and its workings.⁶²

58. *See supra* Part I.

59. *Number of Americans Who Support the ICC Grows*, IPSOS (Apr. 11, 2018), https://www.ipsos.com/sites/default/files/ct/news/documents/2018-04/american_bar_association-factum-2018_04_11.pdf [hereinafter Ipsos 2018 Public Opinion Poll].

60. *Id.* Other researchers encountered a similar problem. In a 2019 study of 1,020 online participants, about half had no prior knowledge of the ICC, and even those with knowledge were not deeply familiar. Kelebogile Zvobgo, *The Trump administration opposes the International Criminal Court. Do Americans Agree?*, WASH. POST (Apr. 28, 2019, 1:00 AM), <https://www.washingtonpost.com/politics/2019/04/28/trump-administration-opposes-international-criminal-court-do-americans-agree/>.

61. Zvobgo, *supra* note 60.

62. PATRICK VINCK & PHUONG PHAM, BUILDING PEACE SEEKING JUSTICE: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT ACCOUNTABILITY AND SOCIAL RECONSTRUCTION IN THE CENTRAL AFRICAN REPUBLIC 3 (Hum. Rts. Ctr., Univ. of Cal., Berkeley 2010), <https://hhi.harvard.edu/files/humanitarianinitiative/files/building-peace-seeking-justice.pdf?m=1612807649> (finding that only one third of survey respondents in the Central African Republic had heard of the ICC); *Knowledge and Perception of the ICC*, HARV. HUMANITARIAN INITIATIVE, <http://www.peacebuildingdata.org/research/uganda/results/justice-accountability/knowledge-perception-icc> (last visited June 11, 2021) (describing a 2010 survey conducted in Northern Uganda recognizing that “factual knowledge of the ICC is relatively low”).

As a result of this lack of knowledge, the public is very susceptible to outside comments in forming an opinion about the Court. Thus, repeated false statements by state leaders about the Court are especially influential among an uninformed public and can easily radicalize public opinion against the ICC as an unaccountable, politicized, or even racist institution. This is especially so given that high-profile politicians' statements about the Court are often highlighted in national and international media, whereas information about the Court and its jurisdiction is much less publicly available to those unfamiliar with international criminal justice. Further, when officials and entities support and defend the ICC against fake news campaigns, these defenses often go underreported, at least in comparison to the misrepresentative comments that sparked those defenses.⁶³ Thus, while fake news campaigns against the Court often dominate media and the internet, proponents' statements of truth often go ignored.

Indeed, without proper foundational knowledge of the ICC, it is easy for the public to criticize or misunderstand its intent or authority. This has repeatedly proved problematic for the Court, fostering unrealistic expectations of what cases the Court can and should hear. While the Court has been robustly criticized by leaders like President Trump and Prime Minister Netanyahu for conducting investigations into crimes over which the Court has jurisdiction, the Court also receives regular public criticism for failing to hear cases over which it *lacks* jurisdiction.⁶⁴ As noted in the Office of the Prosecutor's 2019–2021 Strategic Plan, "affected communities and members of the public often expect the Office [of the Prosecutor] to exercise jurisdiction in the most serious situations of conflict and criminality around the world, including situations where the Court has no jurisdiction."⁶⁵

Moreover, public opinion polls reflect that the ICC's mandate aligns with the type of justice the public seeks. For instance, in the aforementioned 2018 Ipsos Study, seventy-three percent of the 1,004 Americans polled endorsed "international organizations that support human rights and hold individuals accountable for mass atrocities."⁶⁶ Thus, even without knowing about the ICC or its specific procedures, these Americans are supportive of its mandate.

63. Ochs, *supra* note 8, at 622.

64. See, e.g., HARDtalk, *Chile Eboe-Osuji: Can the International Criminal Court achieve its goals?*, BBC SOUNDS (June 22, 2020), <https://www.bbc.co.uk/sounds/play/w3cszcl1y> (in which the host criticized former ICC Judge and President Eboe-Osuji both for the ICC's decision to pursue an investigation into U.S. nationals, in a case in which the Court has found it has jurisdiction, and for failing to pursue an investigation in Syria, where the Court has no jurisdiction); see also Netanyahu Statement Regarding ICC Decision, *supra* note 9 (criticizing the ICC for not pursuing investigations against Iranian and Syrian dictators).

65. ICC Off. of the Prosecutor, *Strategic Plan 2019–2021*, at ¶ 8(a) (July 17, 2019), <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>.

66. Ipsos 2018 Public Opinion Poll, *supra* note 59.

Likewise, among those more familiar with the ICC, many want the Court to continue its work in prosecuting atrocity crimes that would otherwise go unpunished. For instance, in a 2020 online survey of 1,009 Canadians, ninety-five percent of respondents agreed that the ICC should “investigate alleged war crimes *wherever they may occur*.”⁶⁷

Given these views, it reasons that if the public were more familiar with the ICC, its mandate, and the Prosecutor’s reasons for pursuing the cases before the Court, the public would be supportive. However, this support is impossible when the public is only exposed to the bombastic, misleading narratives woven by the Trump and Netanyahu Administrations. Accordingly, the ICC, and specifically the Office of the Prosecutor, need to devote more resources and effort to fostering public knowledge and understanding of the ICC—including its jurisdictional reach and limitations—to cultivate greater legitimacy. Only through the spread of truth and knowledge can the ICC effectively fight against fake news campaigns.

While the ICC is perpetually constrained by limited resources, to recover from the potential impact of the ongoing fake news campaigns, the Court must dedicate time, funds, and effort to spreading knowledge and information about the Court throughout both States Parties and non-States Parties—especially those currently subject to investigation. This requires a more effective use of public relations, an area in which the Court has previously fallen flat.⁶⁸ Specifically, the Court must work to more widely and clearly disseminate information pertaining to ICC processes and procedures to the public and effectively promote its accomplishments. Additionally, greater attention must be devoted to outreach, in which the Court connects with and seeks cooperation from the victims of the crimes it is investigating.⁶⁹

CONCLUSION

As the Prosecutor’s investigations into both Afghanistan and Palestine remain ongoing, the full impacts of the United States’ and Israel’s fake news campaigns against the Court have yet to be seen. And while fake news can pose devastating consequences to the ICC, given its reliance on cooperation, it has

67. Canadians for Justice and Peace in the Middle East, et al., *No Double Standards: Canadians Expect Greater Impartiality vis-à-vis Israel*, 8 (Sept. 16, 2020), https://d3n8a8pro7vhmx.cloudfront.net/cjpme/pages/5082/attachments/original/1600108564/Survey_2020_Release_two_%E2%80%93Final.pdf?1600108564 (emphasis in original).

68. Bartram S. Brown, *The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit*, 31 TEMP. INT’L & COMP. L.J. 145, 155 (2017) (critiquing the ICC for “bad public relations” in the context of the Kenya Situation).

69. *Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report*, at 125–26, ICC-ASP/19/16 (Sept. 30, 2020) (defining outreach efforts as opportunities for the ICC to “win the confidence, support, and cooperation of people and communities that have often been traumatized and scarred by the events the ICC is investigating”).

also provided the Court with some unanticipated benefits. Through highly publicized comments and controversial sanctions, the United States and Israel have opened a public dialogue around the International Criminal Court—an entity which relatively rarely graces the pages of widely read international news sources—and in doing so, have offered the Court public fora in which to explain its operations to the public and tout its accomplishments. This presents the perfect opportunity for the ICC to educate the public about its work and limitations and to cultivate public support.

Moreover, as journalist Thierry Cruvellier has recognized, political leaders' recognition of the ICC as a threat to superpowers like America and its allies, gives the Court "some of the stature it lacks."⁷⁰ At the same time, the United States' and Israel's current predicaments highlight their state leaders' failure to prosecute their own nationals for the commission of internationally recognized crimes—an action which would effectively shut down any opportunity for ICC investigation and prosecution. This perspective both shames these nations for their failure to prosecute heinous atrocities by their nationals and drives home one of the primary goals of the ICC: to achieve justice for terrible crimes that would otherwise go unpunished.

The ICC, as an institution dedicated to prosecuting "the most serious crimes of concern to the international community as a whole,"⁷¹ will always be controversial and will constantly bear the brunt of fake news and false claims. However, if handled correctly, the ICC just may be able to utilize this misleading rhetoric for its own benefit.

70. Thierry Cruvellier, *Why the I.C.C. Should Rejoice when America Attacks It*, N.Y. TIMES (Sept. 16, 2018), <https://www.nytimes.com/2018/09/16/opinion/international-criminal-court-icc-bolton-us.html>

71. Rome Statute, *supra* note 3, at art. 1.

