

How the U.S. Should Respond to the ICC's Decision to Investigate Americans

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KEY TAKEAWAYS

The U.S. has consistently rejected ICC claims of jurisdiction over U.S. persons, and rightly taken specific actions to protect its citizens from ICC jurisdiction.

The ICC's recent decision to proceed with an investigation that could target Americans requires the Trump Administration to take additional protective measures.

The U.S. should refuse to cooperate with the ICC investigation, press other governments not to turn U.S. persons over to the ICC, and deny visas to ICC officials.

In November 2017, the prosecutor for the International Criminal Court (ICC), Fatou Bensouda, announced that she had formally requested authorization to open an investigation into war crimes and crimes against humanity allegedly committed by U.S. troops and employees of the U.S. Central Intelligence Agency in Afghanistan and other ICC states parties.¹ The ICC Pre-Trial Chamber originally denied the request.² After the prosecutor appealed, the ICC Appeals Chamber overruled the decision of the Pre-Trial Chamber on March 5, 2020, and authorized the prosecutor to proceed with the investigation.³

This means that, in the near future, the ICC could issue warrants seeking the arrest of current and former U.S. officials, military personnel, and government employees despite the fact that the U.S. has chosen not to ratify the Rome Statue of the ICC, has

This paper, in its entirety, can be found at <http://report.heritage.org/ib5050>

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already investigated the alleged torture and mistreatment (and, where accusations were found credible, conducted trials and punished the guilty), and rejects the ICC's claims of jurisdiction over U.S. persons and actions. The prospect of an ICC investigation of U.S. persons should lead Congress and the Trump Administration to take additional steps to protect U.S. persons from claims of ICC jurisdiction.

The U.S. and the ICC

The U.S. was deeply involved in negotiation of the Rome Statute, but ultimately voted against adopting the final version of the treaty in 1998 due to the failure to address its concerns, including its claims of jurisdiction over non-party states, an uncertain definition for the crime of aggression, failure to respect the role of the Security Council, and other matters.⁴ In December 2000, President Bill Clinton authorized the U.S. delegation to sign the Rome Statute to facilitate U.S. efforts to address U.S. concerns, but emphasized that the U.S. still had “concerns about significant flaws in the treaty.”⁵ Those concerns resulted in President Clinton not submitting the treaty to the Senate for its advice and consent—necessary for ratification—and recommended that his successor also refrain from doing so unless U.S. concerns were addressed.

The Bush Administration, after failing to secure the changes necessary for addressing U.S. concerns, “un-signed” the Rome Statute,⁶ and took additional steps to protect U.S. nationals, officials, and service members from the ICC. These included:

- Signing the American Service-Members' Protection Act (ASPA), which restricts U.S. interaction with and support of the ICC.⁷
- Entering into Article 98 agreements that preclude other nations from surrendering, extraditing, or transferring U.S. persons to the ICC or third countries for that purpose without U.S. consent.⁸

The Bush Administration did support the purposes of the ICC in some instances, however, including deciding not to veto U.N. Security Council Resolution 1593 under which the Security Council referred “the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.”⁹

The Obama Administration was more positively disposed to the ICC. Policy shifts included actively participating in ICC meetings, voting for a

Security Council referral of the situation in Libya to the ICC, and turning two individuals sought by the ICC for alleged crimes in Uganda and the Democratic Republic of the Congo over to the ICC.¹⁰ The Obama Administration did not, however, re-sign the Rome Statute or seek ratification, and maintained U.S. Article 98 agreements with other nations.

The Afghanistan Investigation

The relationship between the U.S. and the ICC had, over the first 15 years of the court's existence, evolved into a predictable pattern. Although the U.S. chose not to be a party to the Rome Statute and did not recognize the jurisdiction of the court over U.S. persons, it was at the same time willing to assist the ICC's efforts to hold non-U.S. individuals accountable in situations where the Security Council or individual governments agreed to recognize the court's jurisdiction. This pattern, or arrangement, was upset when the ICC prosecutor decided to request a formal investigation into war crimes and crimes against humanity allegedly committed in Afghanistan, including:

War crimes by members of the United States ("US") armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency ("CIA") in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003–2004.¹¹

The ICC's claim of jurisdiction arises from Afghanistan's accession to the Rome Statute in 2003. Under the Rome Statute, the ICC claims jurisdiction over crimes committed in the territory of a state party, even if the individuals accused of committing the crimes were from a non-party to the Rome Statute such as the United States. If a government, such as Afghanistan's, freely chooses to subject its citizens to ICC jurisdiction, that is its choice, but Afghanistan's decisions do not bind the U.S.

A fundamental principle of international law is that a state's legal obligations are based on its expressed consent to be bound through ratification or acceptance of the obligation or long-standing practice. To date, 123 countries have decided to become parties to the Rome Statute, and the U.S. is not one of them. ICC claims of jurisdiction over U.S. persons are not based on U.S. consent. In fact, the U.S. has more than declined to ratify the Rome Statute: The U.S. consistently rejected ICC claims of jurisdiction over U.S. persons even before the Rome Statute entered into force, and took specific actions designed to protect its citizens from ICC jurisdiction.

To put a finer point on this, the U.S. secured exclusive jurisdiction over U.S. military and supporting personnel by the Afghan government prior to that country's accession to the Rome Statute, and has a bilateral agreement with the Afghan government not to surrender U.S. persons to the ICC.¹² Moreover, since exclusive U.S. jurisdiction was codified through a bilateral treaty prior to Afghanistan's accession to the Rome Statute, an argument has been made that the investigation of U.S. persons for actions in Afghanistan "would violate the Vienna Convention on the Law of Treaties and muddy the existing debates related to resolving conflicts between equally binding treaty norms."¹³ Thus, the U.S. saw the investigation as ICC overreach, an unlawful overriding of pre-existing treaty obligations, and a direct assault on U.S. sovereignty.

The ICC's request is also an affront to a fully functioning, robust U.S. legal system. The ICC is supposed to operate under the principle of complementarity, that is, it only activates when it perceives national authorities as unwilling or unable to prosecute genuinely. The United States has conducted hundreds of criminal investigations into allegations from Afghanistan and elsewhere.

For example, the United States presented the Second Periodic Report on U.S. implementation of the Convention Against Torture to the U.N. Committee Against Torture in May 2006 and informed the committee that the U.S. had

carried out more than 600 criminal investigations into allegations of mistreatment, and more than 250 individuals have been held accountable for detainee abuse. Their punishments have included courts-martial, prison terms for as long as ten years, formal reprimands and separation from our military services.¹⁴

The Obama Administration presented its report on U.S. compliance with the Convention Against Torture in August 2013, which detailed ongoing investigative activities related to alleged detainee mistreatment, the conclusions of those investigations, and examples of prosecutions.¹⁵ Unlike the 2006 report, which did not cover activities related to detainees held by the CIA, the Obama Administration's report detailed the investigative steps taken with respect to alleged abuse of the relatively few terrorist detainees held by the CIA.

The record shows that the U.S. has taken allegations of detainee abuse extremely seriously, has policies in place to prevent further abuse, and has investigated every allegation. Most allegations proved to be false. The United States, under any fair reading of the facts, has complied with its obligations under domestic law and the Convention Against Torture.

Not surprisingly, the U.S. categorically rejected the ICC prosecutor's request for an investigation¹⁶ and announced that it would not cooperate with the investigation. The U.S. took no further substantive action against the ICC at that time.

In 2018, then-National Security Advisor John Bolton stated, "We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us."¹⁷ Bolton did warn, however, that the U.S. was prepared to take additional steps if the ICC "comes after us, Israel or other U.S. allies."

The U.S. deemed such additional steps largely unnecessary when the ICC Pre-Trial Chamber denied the prosecutor's request for an investigation.¹⁸ The U.S. did, however, undertake one pointed response by revoking the visa of the ICC prosecutor.¹⁹

The ICC Appeals Chamber decision on March 5, 2020, to overrule the Pre-Trial Chamber and authorize the prosecutor to proceed with the investigation renews the possibility that U.S. military personnel, officials, and government employees could be the targets of an ICC investigation, and even ICC arrest warrants.²⁰

The condemnation of the Appeals Chamber ruling by Secretary of State Michael Pompeo was unequivocal:

This is a truly breathtaking action by an unaccountable political institution, masquerading as a legal body.... The United States is not a party to the ICC, and we will take all necessary measures to protect our citizens from this renegade, so-called court. This is yet another reminder of what happens when multilateral bodies lack oversight and responsible leadership, and become instead a vehicle for political vendettas. The ICC has today stumbled into a sorry affirmation of every denunciation made by its harshest critics over the past three decades.²¹

Secretary Pompeo, like his predecessors, is correct to reject the ICC investigation. However, in light of the recent judgment of the Appeals Chamber, the current U.S. policy of not cooperating with, or supporting, the ICC is no longer sufficient. The U.S. must take assertive steps to protect Americans from the illegitimate claims of jurisdiction of the ICC.

Next Steps

The U.S. had made clear that it sees ICC claims of jurisdiction as illegitimate and that it will not cooperate in any investigation involving U.S. persons. This benign neglect was sufficient when the prospect of an ICC

investigation of Americans was blocked. However, it is insufficient in light of the recent ruling. Specifically, the U.S. should:

- **Reiterate that the U.S. will not ratify the Rome Statute and that it rejects ICC claims of jurisdiction over U.S. persons.** Great credence in international law is placed on state practice and the U.S. should make its position clear.
- **Refuse to cooperate with the ICC investigation.** The U.S. is not a party to the Rome Statute and has no legal obligation to cooperate with or assist the ICC in its investigation of Americans, or in any other instance.
- **End all remaining U.S. cooperation with the ICC.** The U.S. has in the past participated in ICC meetings and assisted the ICC in its efforts, including sharing intelligence and turning over individuals sought by the court. The U.S. should no longer grant credibility to the court through participation or support, and the Administration should work with Congress to enshrine these restrictions in law.
- **Deny visas to ICC officials.** Last year, the U.S. announced a policy of “restricting issuance of visas to any and all ICC officials determined to be directly responsible for an ICC investigation of U.S. personnel, or of allied personnel without our allies’ consent.”²² Last year, the U.S. followed through by revoking a visa for the ICC prosecutor. The U.S. should enforce this policy stringently, including restricting the movement of these officials to within 25 miles of the United Nations headquarters building if they travel on official business to Turtle Bay.
- **Hold nations that have signed Article 98 agreements with the U.S. to their commitments and negotiate new agreements.** The U.S. should remind all governments with which it has Article 98 agreements that they are obligated not to surrender U.S. persons to the court or to any third party that has intent to surrender U.S. persons to the court. The U.S. should explore interest by other countries in signing similar agreements.
- **Incorporate ICC protections into U.S. status of forces agreements.** In addition, as the Bush Administration did in the early 2000s,²³ the U.S. should seek to insert language into U.N. Security

Council resolutions shielding U.N. peacekeepers from non-ICC states from ICC jurisdiction.

- **Inform partners that cooperation with the ICC in investigating U.S. persons will influence decisions about their relationship with the U.S.** The ASPA originally restricted assistance to countries unless they signed an Article 98 agreement with the U.S.; amendments later eliminated these restrictions on assistance.²⁴ The Trump Administration should work with Congress to ensure that countries that seek to arrest Americans at the behest of the ICC or surrender U.S. persons to the ICC are not rewarded with U.S. assistance. Finally, it should inform its partners that the ICC's attempts to investigate U.S. persons for alleged war crimes in Afghanistan is unnecessary and unwarranted, and warn foreign governments that surrendering U.S. persons to the ICC could have consequences for U.S. economic and military assistance and that country's security relationship with the U.S.

Conclusion

The decision of the ICC to proceed with an investigation that could involve Americans underscores the wisdom of the U.S. decision to forego ratification of the Rome Statute and enact laws circumscribing U.S. engagement with the ICC. However, the recent decision to proceed with an investigation that could target Americans requires additional protective measures. As President Donald Trump stated last year,

Since the creation of the ICC, the United States has consistently declined to join the court because of its broad, unaccountable prosecutorial powers; the threat it poses to American national sovereignty; and other deficiencies that render it illegitimate. Any attempt to target American, Israeli, or allied personnel for prosecution will be met with a swift and vigorous response.²⁵

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Endnotes

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4. News release, "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court," United Nations, L/2889, July 20, 1998, <https://www.un.org/press/en/1998/19980720.l2889.html> (accessed March 23, 2020).
5. Coalition for the International Criminal Court, "Statement by US President Bill Clinton Authorizing the US Signing of the Rome Statute of the International Criminal Court," December 31, 2000, <http://www.iccnw.org/documents/USClintonSigning31Dec00.pdf> (accessed March 23, 2020).
6. The text of the letter, signed by U.S. Under Secretary of State for Arms Control John Bolton, stated: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." John R. Bolton, letter to U.N. Secretary General Kofi Annan regarding the Rome Statute of the International Criminal Court, May 6, 2002, <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> (accessed March 23, 2020).
7. The ASPA was later amended to remove restrictions on military assistance and training to countries that did not sign an agreement with the U.S. See U.S. Department of State, "American Service-Members' Protection Act," Bureau of Political-Military Affairs, July 30, 2003, <https://2001-2009.state.gov/t/pm/rls/othr/misc/23425.htm> (accessed March 23, 2020).
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13. As argued by Professor Michael Newton, "Treaty negotiators expressly rejected efforts to confer jurisdiction to the ICC based on its aspiration to advance universal values or a self-justifying teleological impulse to bring perpetrators to justice. Rather, its jurisdiction derives solely from the delegation by States Parties of their own sovereign prerogatives.... The ICC is not empowered to sweep aside binding bilateral agreements between sovereign states. By asserting that it has power to abrogate underlying bilateral treaties, the Court undermines ancient precepts of international law and harms the principles of treaty law. The ICC is not constructed as an omnipotent super-court with self-proclaimed universal jurisdiction based upon the presumption that the Rome Statute operates in isolation from other treaty-based constraints on sovereign prerogatives.... [T]he Court cannot unilaterally override the validity of existing jurisdictional treaties. The assertion of such powers would violate the Vienna Convention on the Law of Treaties and muddy the existing debates related to resolving conflicts between equally binding treaty norms." Michael A. Newton, "How the International Criminal Court Threatens Treaty Norms," *Vanderbilt Journal of Transnational Law*, Vol. 49, No. 2 (August 25, 2016), pp. 371-431, <https://www.vanderbilt.edu/jotl/wp-content/uploads/sites/78/3.-Newton-copy.pdf> (accessed March 23, 2020).
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