

Stay the Hand of Justice? US Resistance to the International Criminal Court*

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Abstract

The United States, a key architect of global governance institutions in the twentieth century, has moderated its international engagement in the twenty-first century. In climate governance, the United States signed but did not ratify the Kyoto Protocol, then acceded to but ultimately withdrew from the Paris Climate Accord. In trade, the United States entered but later abandoned the Trans-Pacific Partnership. And in human rights, the United States failed to join core treaties like the Convention on the Rights of Persons with Disabilities and the Rome Statute of the International Criminal Court. The United States' withdrawal from these and other international regimes sparks the question: Has "America First" made America irrelevant? I focus my answer to this question on the United States' refusal to join the ICC, the apogee of the international criminal justice system that it helped build. I argue that, despite the efforts of antiglobalists and rule-of-law obstructionists like Donald Trump, the United States remains relevant to international criminal justice and may yet strengthen it, albeit unintentionally.

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Introduction

The United States, a key architect of global governance institutions in the twentieth century, has moderated its international engagement in the twenty-first century. In climate governance, the United States signed but did not ratify the Kyoto Protocol, then acceded to but ultimately withdrew from the Paris Climate Accord. In trade, the United States entered but later abandoned the Trans-Pacific Partnership. And in human rights, the United States failed to join core treaties like the Convention on the Rights of Persons with Disabilities and the Rome Statute of the International Criminal Court.

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From Torchbearer to Laggard: The United States and International Criminal Justice

The United States helped build the architecture of modern international criminal justice, beginning in the 1940s with the Nuremberg and Tokyo tribunals, established to prosecute German and Japanese leaders suspected of war crimes, crimes against humanity, and crimes against peace during the Second World War. The United States' leadership in international justice continued through to the 1990s with the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda, designed to address war crimes, crimes against humanity, and genocide in the Balkans and Rwanda (Cerone 2007). The United States even helped draft the Rome Statute and President Bill Clinton signed it at the end of his second term. Clinton described the ICC as a means of advancing the

principles of accountability and human rights that the nation has historically supported (Amann and Sellers 2002).

When George W. Bush succeeded Clinton, he withdrew the United States' signature from the Rome Statute, citing concerns about US sovereignty and national security. And shortly after the invasion of Iraq and the ensuing war, the Bush administration launched an aggressive campaign against the ICC and ICC member states that did not sign bilateral immunity agreements (BIA). Bush alleged that US personnel would be treated unfairly because of the war in Iraq and, more generally, the "war on terror." Bush's BIA conditioned US military and foreign aid on recipient countries agreeing to not turn over US troops to the ICC (Zipprich 2010). Whatever the United States had done for the global justice regime in the twentieth century, it would be AF moving forward: concerns about US national interests eclipsed concerns about international human rights (Sandholtz 2009).

The Bush administration's hostility to the ICC did wane in later years. Senior military officers and US allies criticized the BIA policy and, consequently, many BIA were reversed. The administration also began to see the Court's utility, at least in terms of investigating allegations of grave abuses in other countries. In this vein, the United States permitted the United Nations Security Council (UNSC) to refer the genocide in Darfur, Sudan, to the ICC. To be sure, the United States did not vote in favor of the referral but the country's abstention was functionally equivalent: the situation in Darfur was referred and an investigation proceeded. For his part, President Barack Obama cautiously supported the ICC when he came to office. Under Obama, the United States supported another UNSC referral, this time regarding possible war crimes and crimes against humanity in Libya following the Arab Uprisings and the fall of Muammar Gaddafi. The Obama administration also provided the ICC resources to locate, arrest, turn over, and prosecute ICC fugitives (American Bar Association 2016; American Non-Governmental Organizations Coalition for the International Criminal Court 2017).

The détente between the United States and the ICC was short lived, however. When Donald Trump assumed the presidency, he and his allies began waging a war on the Court. At this point, the threat of an ICC investigation into alleged abuses by US military and intelligence personnel was no longer an abstract notion. During Trump's first year in office, the ICC's chief prosecutor, Fatou Bensouda, requested authorization to open an investigation into suspected war crimes in Afghanistan, not only by members of the Taliban and the Afghan National Security Forces, but also by US military and intelligence personnel. The Court's judges granted Bensouda authorization in March 2020, marking a historic development in international criminal justice: for the first time, US leaders, armed forces, and intelligence professionals face the possibility of international criminal accountability (Zvobgo 2020).

Trump administration officials, including Secretary of State Mike Pompeo and former National Security Advisor John Bolton, had previously urged, even threatened, interference with ICC proceedings and personnel. And in June 2020, the administration delivered, with Trump declaring a state of emergency and issuing an executive order¹ that imposed sanctions on any individual who is involved in or who supports materially an investigation into the United States or US allies. The executive order outlined some of the most severe and far-reaching sanctions we have seen from this and other administrations.

Trump ordered both diplomatic and economic sanctions, including the freezing of financial assets based in the United States and restrictions on travel. These apply both to individuals directly involved and their relatives—something that we have not often seen, even in sanctions for suspected terrorists.² Because of its inclusion of persons who provide material support to the ICC, the order potentially extends to human rights activists and organizations, who often work with the Court in areas like victim outreach and who regularly submit research briefs to the Court. In September 2020,

¹ Executive order 13,928, June 11, 2020.

² Executive order 13,224, September 10, 2019.

the sanctions regime officially began, with chief prosecutor Bensouda and one of her deputies, Phakiso Mochochoko, as the first targets (UN News 2020).

But do these actions make America irrelevant to the international criminal justice regime? I propose that they actually made America *more* relevant. Rather than stay the hand of justice, the United States' escalations may ultimately bolster the Court's effectiveness. This would not be by design, of course, but rather would be a consequence of the US government's deafness to the interests of its citizens and to the concerns of various international actors, including US allies who are ICC member states.

The Afghanistan Investigation and the Importance of the United States to the ICC's future

The ICC's investigation into possible war crimes by the United States and non-US personnel in Afghanistan represents an opportunity for the Court to "get things right." Soon entering its third decade of operation, the beleaguered Court has failed to arrest, prosecute, convict, and sentence most of its targets (International Criminal Court 2020). However, it has managed to do what was previously unthinkable: commence an investigation into one of the most powerful countries in the world—despite the United States not being a party to the Rome Statute, despite the US interference, and even despite some of the Court's judges. As previously mentioned, chief prosecutor Bensouda requested authorization to open an investigation in Afghanistan in 2017, following a decade-long preliminary examination, which provided a reasonable basis to conclude that American soldiers and intelligence officers had committed war crimes, including "torture, cruel treatment, outrages upon personal dignity, and rape" during interrogations (International Criminal Court 2016). While the United States would normally be outside of the Court's reach because it is not a member, it is subject to ICC review in this instance because the alleged abuses occurred on the territory of a member, Afghanistan. The ICC's pretrial chamber rejected Bensouda's request in April 2019, ostensibly due to

pressure from the Trump administration (Amnesty International 2019; Human Rights Watch 2019). However, this controversial decision, which sparked outrage from the global human rights community and ICC member states, was ultimately reversed by the appeals chamber in March 2020—a historic decision that then prompted Trump’s sanctions order in June 2020.

Bensouda undoubtedly knew the stakes: how the ICC deals with the United States will set an important precedent. If US suspects were charged, arrested, prosecuted, and, where guilt was determined, convicted and sentenced, it would put much needed wind in the sails of international justice advocates the world over. It would help improve the ICC’s credibility after a lackluster first two decades and strengthen the institution. It would communicate clearly that no country and no person is beyond the hand of justice. History has been made once and it may yet be made again.

Conclusion

One thing that the Trump administration missed in its AF policy is the reality that many Americans care about US leadership in the world, something President Joe Biden and Vice President Kamala Harris zeroed in on their winning campaign. In terms of international justice and the ICC in particular, a majority of Americans support the Court and think that the United States should join, as the Court’s aims reflect US values and may advance US interests like respect for human rights, democratic accountability, and peace (Zvobgo 2019). The government’s position to date does not reflect the public’s position, so historical government hostility toward the Court is not necessarily where the story ends, of note under a new Biden–Harris administration.

The Trump administration’s prior actions vis-à-vis the ICC may even enhance public support for the Court. Trump’s and Republicans’ favorability among the electorate has been on the decline. Biden and Harris’s historic election is evidence of this. Supporting the ICC may be one more way that Americans can oppose Trump and Trumpism, and stem the legacy of anti-globalism and anti-rule of law policies (Zvobgo and Chaudoin 2020). More generally, opposition to Trump policies and

administration-sanctioned abuses underlie some people's support for the Court, as seen in Zvobgo's (2019) survey data. Among the respondents, one indicated, "I can no longer trust my government to uphold the values we have fought for . . . [a] check on a leader with clear authoritarian tendencies would help" (Zvobgo 2019, 1073). And so, the United States may yet re-engage, even join, the ICC among a range of international institutions—due in no small part to citizens' preferences. Joe Biden's and Kamala Harris' declared "commitment to advancing human rights and democracy around the world" certainly indicates as much (Joe Biden for President 2020).

Skeptics may opine that the US public may only support the ICC and US membership in the abstract, but that, if American service members and intelligence personnel are actually prosecuted and, where appropriate, convicted, and sentenced by the Court, Americans will not view the Court so favorably. Essentially, Americans may be "exceptionalists"—supporting international criminal justice for others but not for themselves. Thus, the Trump administration's actions might not backfire and a Biden–Harris administration might not further engage in the international criminal justice regime. This is a possibility. And all published survey data, from interest groups like the American Bar Association and scholars like Simmons (2017) and Zvobgo (2019), predate the now-authorized formal investigation into US personnel in Afghanistan. The investigation (and any future steps toward criminal accountability for Americans) may produce a chilling effect on public opinion. Yet when survey researchers have previously raised the specter of US personnel being implicated in ICC proceedings, this has not significantly changed attitudes. In 2018, the American Bar Association reported:

81% of those polled either did not change their opinion, or became more favorable to the ICC, after they were informed that the Court would potentially investigate alleged crimes committed by members of all groups involved, namely the US military, CIA, Taliban, and Islamic State. Specifically, 50% of all Americans said that this information did not change their opinion of the ICC; 31% said it made their opinion of the ICC much or somewhat more favorable; 19% said it made their opinion of the Court much or somewhat less favorable. (American Bar Association 2018)

Americans are less concerned with US personnel being investigated and prosecuted than they are with the process being fair (Zvobgo 2019). This essay invites additional theoretical and empirical research on what issue frames can alter public opinion toward or against international accountability for serious crimes, as there are many considerations that may shape US public opinion as the Afghanistan investigation proceeds. These include arguments about fundamental fairness at the Court, as well as human rights and national interest arguments, partisan cues, and judgments about the Court's effectiveness.

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