International court v. Trump: A case of politics, not justice

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While he is in a pitched battle with [the memoir](https://www.nytimes.com/2020/06/10/us/politics/trump-john-bolton-book.html) [John Bolton](https://thehill.com/people/john-bolton) plans to publish next week, [President Trump](https://thehill.com/people/donald-trump) is fully on board with his former national security adviser’s hostility toward the International Criminal Court (ICC).

On Thursday, the president followed through on the longstanding threats by his foreign policy team, issuing [new sanctions](https://www.wsj.com/articles/white-house-expands-sanctions-against-international-criminal-court-11591882386) against the ICC over its provocative effort to investigate and prosecute American military, intelligence, and perhaps even former political officials for alleged war crimes in Afghanistan.

Bolton was right, during his Trump administration days, to admonish the ICC when it was threatening to conduct this probe. With the tribunal now having pressed ahead, the president is right to both clobber ICC operatives with punitive measures and undermine the court’s dubious legitimacy.

The United States is not a member of the ICC, a creation of the 1998 [Rome Treaty](https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf). In this, we are no outlier. The court’s universalist pretensions notwithstanding, some 70 countries have declined membership. The non-members, for better or worse, are among the world’s most consequential nations — e.g., China, Russia, India and Israel. Moreover, as [Bolton observed](https://wjla.com/news/nation-world/bolton-tells-icc-youre-dead-to-us-a-look-behind-the-trump-administrations-policy) in a 2018 speech, non-members represent two-thirds of the world’s population and 70 percent of its national armed forces.

In essence, the ICC is the plaything of the European left, post-sovereign technocrats, and progressive legal elites — one-worlders who won’t provide for their own security and dream up schemes to delegitimize actions that sovereign states, especially the United States, take in their national interests. The ICC is targeting the U.S. during Trump’s presidency in the expectation of support from “woke” America — you don’t find the tribunal tripping over itself to address, say, China’s [persecution of the Uyghurs](https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html).

American law and rudimentary international law principles render the ICC powerless to exercise jurisdiction over our nation in the absence of our consent. That consent can be given only under the procedures prescribed by the Constitution, in particular, the [Treaty Clause](https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/346). The Rome Treaty has never even been submitted for the Senate’s consideration, much less ratified.

ICC provocateurs, led by chief prosecutor [Fatou Bensouda](https://www.icc-cpi.int/about/otp/who-s-who/pages/fatou-bensouda.aspx" \t "_blank) of Gambia, counter that jurisdiction lies because Afghanistan, where the “war crimes” are claimed to have occurred, is a member of the ICC. That is Kabul’s problem. For us, it is irrelevant. We have not consented to subject our nation or our citizens to the court’s jurisdiction. Period, full-stop.

But let’s play along. Assume, for argument’s sake, that jurisdiction over a non-member could be established if its supposedly cognizable crimes occurred in the territory of an ICC member state. There still would be no basis for ICC proceedings.

First, Afghanistan, like dozens of other countries, has executed a bilateral immunity agreement with the United States. Under this pact, Kabul is obliged to refrain from cooperating in ICC efforts to proceed against Americans. Given its existential dependence on American security and financial assistance, Afghanistan would have much to lose if it breached its obligation to us. And rest assured that the American taxpayer, with patience for [our thankless mission](https://www.cfr.org/timeline/us-war-afghanistan) there already threadbare, is in no mood to hear about Afghanistan’s competing ICC obligations.

Second, even if there were a viable argument for ICC proceedings against a non-member state based on the member-state locus of alleged war crimes, ICC jurisdiction would be foreclosed by the tribunal’s limited “complementarity” mandate. Under this principle, ICC investigations are triggered only when a member country’s own legal system refuses or is unable to investigate and prosecute war crimes, or such crimes against humanity as genocide and torture.

The United States, to the contrary, has aggressively investigated allegations of detainee abuse and other forcible misconduct, prosecuting and otherwise disciplining wrongdoers. As a recent [Heritage Foundation study](https://www.heritage.org/sites/default/files/2020-03/IB5050.pdf) recounts, the Bush administration reported in 2006 that more than 250 individuals had been held accountable — through courts-martial, lengthy prison sentences, and other penalties — after American authorities conducted over 600 criminal investigations. In 2013, the Obama administration likewise reported that the U.S. continued to investigate alleged detainee mistreatment and punish offenders.

Besides not being an ICC member country, the U.S. is neither an outlaw nor a dysfunctional country of the type the ICC was supposedly designed to target.

The ICC stratagem is blatant political aggression by the globalist left against the Trump administration. The alleged war crimes that ICC prosecutor Bensouda wishes to pursue are said to have occurred in 2003-04. The ICC began operations in 2002. Thus, with respect to the open and notorious claims of American malfeasance in Afghanistan, the ICC sat on its hands for nearly two decades — including all through the second Bush-43 term and throughout the Obama presidency. Only when Americans elected President Trump, a staunch opponent of internationalist intrusions on U.S. sovereignty, did the ICC suddenly mobilize.

In any legitimate judicial system, such years of calculated delay would be deemed an intolerable due process violation. The ICC, however, is no legitimate judicial system. As [aptly described](https://www.state.gov/icc-decision-on-afghanistan/) by Secretary of State [Mike Pompeo](https://thehill.com/people/mike-pompeo), it is “an unaccountable, political institution masquerading as a legal body.”

An election beckons in November. If we ever get surcease from our manic moment and return to electoral politics, the ICC should be a cutting-edge issue. It speaks not only to our deep inter-partisan divide, but to internecine Republican rifts.

In many ways, the ICC is a monster of our own making — a [Bill Clinton](https://thehill.com/people/bill-clinton) classic, in fact. The Clinton administration was instrumental to its ill-conceived creation, but the ICC was so rife with problems — vague crimes, lack of due process, jurisdictional grandiosity — that President Clinton got cold feet and declined to join the Rome Treaty. In character, he left things that way so the ICC would not become a problem for Al Gore in the 2000 election; then, after George W. Bush won, Clinton [signed the treaty](https://www.nytimes.com/2001/01/01/world/clinton-s-words-the-right-action.html), knowing it was too late to try for Senate consent and ratification — leaving the mess for his Republican successor.

Bush wisely renounced Clinton’s signature and took significant action to undermine the ICC: executing the aforementioned bilateral immunity agreements and supporting legislation that discouraged other countries from complicity in any ICC actions targeting the U.S. Yet, consistent with the unfortunate Wilsonian turn Bush’s second term took, the State Department suddenly supported the ICC’s [genocide investigation](https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/darfur-sudan.html) against the Sudanese regime for atrocities in Darfur — over the protestations of Bolton, then Bush’s United Nations ambassador. Bolton grasped that our government was legitimizing a fundamentally hostile institution when we should have been isolating it until it withered and died.

Naturally, the ICC became a showpiece in President Obama’s ostentatious pivot away from the “cowboy” approach to foreign relations (a cartoonish distortion of Bush). Obama’s State Department openly collaborated with the tribunal’s operations in Uganda, Libya and the Congo. The president, however, frustrated progressives who hoped he’d bring America into the ICC fold. Obama declined to re-execute the Rome Treaty, let alone submit it for Senate approval. He even relied on Bush-era legislation and a bilateral immunity agreement to insulate American troops from ICC jurisdiction in Mali.

Trump, without ambiguity, sees the ICC as a hostile threat to U.S. sovereignty. That is what it always has been, a reality only elucidated by its latest stratagem. Even before Thursday’s imposition of sanctions, Secretary Pompeo had [revoked Bensouda’s visa](https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html). Now, the president has targeted the ICC under congressional statutes that authorize punitive measures against hostile foreign powers and their facilitators. He is barring ICC officials and their family members from entering the U.S., and blocking financial assets of ICC personnel, as well as those who abet ICC investigations of the United States and its allies (at least those allies who, unlike most of NATO, are not ICC member states).

It is a winning issue for the president. Trump supporters are contemptuous of progressive internationalists, who presume to dictate to the United States. Trump opponents, meanwhile, are caught between their post-American proclivities and what those proclivities have wrought — a rogue ICC.