



International Criminal Court: U.S. Response to Examination of Atrocity Crimes in Afghanistan

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Updated April 16, 2019

On April 5, 2019, Secretary of State Mike Pompeo [revoked](#) the U.S. travel visa permitting International Criminal Court (ICC) Prosecutor Fatou Bensouda to enter the United States, unless visiting U.N. headquarters in New York, citing [legal authority](#) (8 U.S.C. §1182(a)(3)(C)(i)) to restrict entry of persons “whose ... proposed activities in the United States would have potentially serious adverse foreign policy consequences.” Secretary Pompeo explained the reason for the decision was Ms. Bensouda’s possible investigation of allegations of war crimes and crimes against humanity in and related to Afghanistan since 2002, [arguing](#) such activities could “illegitimately target American personnel for prosecutions and sentencing.” The Secretary’s decision is the latest development in the recent worsening of U.S.-ICC relations, a relationship in which Congress has involved itself through legislation and oversight since the ICC’s creation.

ICC Prosecutor’s Activities Concerning the Situation in Afghanistan

The ICC Office of the Prosecutor (OTP) [announced](#) in 2007 that it had received representations of victims of alleged atrocity crimes related to the conflict in Afghanistan, a state party to the [Rome Statute](#) that established the ICC, and that the OTP was conducting a preliminary examination of the situation. Upon the examination’s completion in November 2017, Ms. Bensouda requested permission from the ICC Pre-Trial Chamber to initiate a formal investigation of possible crimes committed in Afghanistan since May 2003 and related crimes committed in other ICC member states since July 2002. In describing the request, alongside descriptions of other alleged crimes and responsible parties, the OTP [stated](#) that there was a “reasonable basis” to believe that U.S. armed forces and CIA personnel had committed “[w]ar crimes of torture, outrages upon personal dignity and rape and other forms of sexual violence” on the territory of

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Afghanistan or in “secret detention facilities” in ICC member states Poland, Lithuania, and Romania, “primarily in the period 2003-2004.”

The United States has asserted that it has completed criminal investigations into all U.S. personnel alleged to have committed such crimes, and therefore the ICC cannot exercise jurisdiction over these allegations, pursuant to the principle of complementarity ([Article 17](#) of the Rome Statute), which prevents the ICC from investigating and prosecuting accused individuals when a national judiciary system has already effectively done so. The findings of the ICC Prosecutor, however, [argued](#) that no U.S. investigations “examined the criminal responsibility of those who developed, authorised or bore oversight responsibility for” the alleged actions amounting to atrocity crimes, and therefore complementarity would not bar the ICC’s possible investigation.

On April 12, 2019, the Pre-Trial Chamber [denied](#) Ms. Bensouda’s request to open an investigation into the situation in Afghanistan, stating that the passage of time, political changes in Afghanistan, and a lack of cooperation from relevant governments made the otherwise valid investigation unlikely to “serve the interests of justice.” U.S. officials have [expressed](#) satisfaction with the outcome, while some observers have [interpreted](#) it as the ICC’s self-interested attempt to avoid criticism and eroding support.

U.S.-ICC Relationship

The United States helped draft the Rome Statute, but voted against the treaty as it lacked assured immunity for U.S. personnel, among other sovereignty concerns. The United States is a signatory to the treaty, but the Senate has not given its consent to ratification, and in 2002 the United States stated it does not intend to become party to the treaty and had no legal obligations arising from its previous [signature](#). In the same year, Congress enacted [legislation](#) to protect U.S. personnel from ICC actions, prohibiting U.S. cooperation with the ICC, and authorizing the President to free U.S. personnel detained by or on behalf of the ICC.

Despite this stance, the United States has taken several actions to support the ICC’s international criminal justice efforts. U.S. [law](#) permits the federal government to assist international efforts to bring alleged perpetrators of atrocity crimes to justice on a case-by-case basis. In 2005, the United States did not veto a U.N. Security Council [resolution](#) referring the situation of the Darfur genocide in Sudan to the ICC. The United States has [facilitated](#) the [handover](#) of wanted individuals into ICC custody. Beginning in 2009, the United States participated as an [observer](#) in the ICC Assembly of States Parties.

Trump Administration Policy

Trump Administration officials have [signaled](#) increasing opposition to ICC actions, including the examination of the situation in Afghanistan, as well as the ICC’s acceptance of jurisdiction over the state of Palestine. In September, National Security Adviser John Bolton [restated](#) U.S. criticisms of the ICC, asserting that it violates U.S. sovereign rights and the Constitution, and is ineffective and unnecessary. A contemporaneous policy [statement](#) from the White House stated that in the case of a formal ICC investigation into Afghanistan, the United States would ban ICC personnel from travelling in the United States, sanction their assets, and prosecute them in the U.S. criminal justice system, and would seek to constrain the ICC through the U.N. Security Council. Secretary Pompeo reiterated these criticisms and proposed responses in his recent press [statement](#) announcing the visa revocation policy for ICC personnel.

Congressional Involvement in U.S.-ICC Relations

In legislation, Congress has expressed both [support](#) for and [opposition](#) to the activities of the ICC, and has restricted U.S. accession to the [ICC](#) or [any](#) international criminal tribunal without Senate advice and consent or appropriate new legislation. Despite the ICC decision not to investigate U.S. personnel in the

Afghanistan conflict, Congress might still examine existing legislation to determine whether it appropriately addresses the issues of protecting U.S. foreign policy interests, ensuring due process for U.S. personnel, and promoting accountability for atrocities committed around the world. Congress might also conduct oversight into the conflict between the Administration and the ICC over jurisdictional issues, to determine whether engagement or continued punitive measures are necessary to best ensure that the ICC does not unfairly place U.S. personnel at risk of detention and prosecution in the future.

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