**It’s Time for President Biden to Get Tough on the International Criminal Court**

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While our allies in Israel have taken a tough stand against the International Criminal Court (ICC), the Biden administration is granting concessions to what many believe to be a highly biased court — and such weakness could have real national security implications for the United States.

Earlier this month, Israel sent an official statement to the ICC, reiterating its position that the court lacks the jurisdiction to investigate Israeli activity in the Palestinian territories, and asserting that Israel would not cooperate with the investigation.

Conversely, the Israelis’ terse announcement came on the heels of the Biden administration’s recent decision to lift sanctions and visa restrictions on certain ICC officials, emphasizing “engagement” with the ICC over distance. These punishing mechanisms were previously put in place by the Trump administration under Executive Order 13928 in response to the ICC granting its chief prosecutor the green light to investigate alleged US war crimes in Afghanistan.

At the same time, the Biden administration has criticized the ICC for “unfairly” targeting Israel, and Vice President Harris told Israeli Prime Minister Benjamin Netanyahu that the US opposes the ICC’s inquiry into Israel.

Despite a possible détente between the Biden administration and the ICC, the ICC’s latest decision to move forward with its investigation into Israeli activity signals that the ICC has no compunctions about ignoring its jurisdictional mandate. As the United States pursues its engagement-focused approach, it should remain wary of the ICC’s intentions.

For starters, what the United States should gather from the ICC’s latest announcement vis-à-vis Israel is that the ICC has no issue violating its chief principle of complementarity, which holds that the court should respect the investigations conducted by states and not seek to repeat or supersede such probes.

To its credit, Israel has investigated alleged war crimes in Gaza, and assigned punishments to the convicted perpetrators, as discussed here and here. Similarly, the United States has conducted and concluded its own investigation into activities in Afghanistan, though the ICC does not believe the investigations have been satisfactory or comprehensive enough. However, a bedrock principle of complementarity is that the ICC is to be strictly a “tribunal of last resort,” not an institution in the service of “second guess[ing] a [State’s] investigative determinations,” as professor Adam Oler has written.

Furthermore, the ICC’s decision to move forward with investigating alleged criminal activity by Israelis in the Palestinian territories evinces a blatant disregard for pre-existing bilateral jurisdictional arrangements, like those defined in the Oslo Accords. In the case of Israel, the Oslo Accords restrict the Palestinian Authority’s (PA) criminal jurisdiction in the Palestinian territories to only Palestinians. Simply stated, jurisdiction over Israelis in the territories is not the PA’s to delegate to the ICC, since the PA never had such jurisdiction itself.

From a US national security perspective, this flagrant indifference of prior jurisdictional arrangements is severely problematic. If the ICC is willing to ignore such monumental treaties as the Oslo Accords, what is to stop them from ignoring other bilateral jurisdictional arrangements, such as the dozens of Article 98 agreements that the United States currently shares with a host of countries?

These bilateral immunity agreements stipulate that an ICC member state will not surrender US nationals to the jurisdiction of the ICC, providing a measure of protection to US private citizens, as well as civilian personnel abroad. As attorneys John Yoo and Ivana Stradner have stated succinctly, “If the global elite want the United States to lead efforts to end killings in places such as Syria, Yemen, or Sudan, the last thing it should do is prosecute American troops when they take on the difficult jobs that no other nation can or will do.”

Any discussion on the ICC must start with a recognition of the ICC’s explicit purpose. Born in large part from the atrocities of the Holocaust, the ICC was established to address “the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.”

Conversely, the ICC was not designed to solve regional disputes involving competing territorial claims, as in the case of Gaza, nor was it designed to replace the court system of functioning democracies, as in the case of both Israel and the United States.

Thus, what makes the Biden administration’s latest form of sanctions relief so pernicious is that ICC officials likely will treat the reprieve as an effective endorsement of their political biases. If the objective is to encourage the ICC to fulfill its role as “the court of last resort in punishing and deterring atrocity crimes,” lamenting their decision-making while still upholding their institutional legitimacy sends a mixed message at best and a blessing at worst. It is time to use the leverage accumulated by the Trump administration — not squander it — in order to compel meaningful reform within the ICC. It starts with resuming a robust sanctions regime.

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