The International Criminal Court and the Trump Administration

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By [John Bellinger](https://www.lawfareblog.com/contributors/jbellinger)

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In a [post](http://www.lawfareblog.com/what-does-john-boltons-appointment-mean-icc-investigation-afghanistan) earlier this week, David Bosco speculated how John Bolton’s appointment as national security adviser might affect the Trump administration’s reaction if the International Criminal Court opens an investigation into possible U.S. war crimes in Afghanistan and other countries. David quotes from an [article Bolton wrote](http://www.wsj.com/articles/the-hague-tiptoes-toward-u-s-soldiers-1511217136)in the Wall Street Journal in November 2017 in which Bolton argued that the United States should welcome the opportunity to “strangle the ICC in its cradle” or at least to tell the ICC Prosecutor that “you are dead to us. Sincerely, the United States.” Either course of action would be unfortunate for both the United States and the ICC, and both sides should take steps to avoid a collision that would be harmful not only to each other but also to the cause of international criminal justice.

As David correctly recalls, Bolton (with whom I worked in the Bush administration from 2001–2006) spearheaded the Bush administration’s efforts in its first term to strangle the fledgling ICC, including by “unsigning” the Rome Statute and strong-arming U.S. allies into signing over one hundred so-called Article 98 agreements promising not to surrender U.S. officials to the ICC. These actions generated significant international hostility towards the United States and fed a false international narrative that the United States was hostile to international justice.

In its second term, while I was the legal adviser at the State Department, the Bush administration pursued a more pragmatic “modus vivendi” with the ICC, agreeing to cooperate with the court in appropriate cases. In March 2005, the United States agreed to allow the U.N. Security Council to ask the court to investigate the genocide in Darfur—by abstaining on Security Council Resolution 1593—and later blocked efforts by China to defer the investigation. In March 2006, the United States encouraged the ICC to use its facilities for the trial of Charles Taylor by the Special Court for Sierra Leone. (I personally called ICC President Philippe Kirsch to register U.S. support.) President George W. Bush waived restrictions on counterterrorism assistance to many ICC members after Secretary of State Condoleezza Rice publicly remarked in 2006 that the restrictions were like “[shooting ourselves in the foot](http://www.nytimes.com/2006/03/12/politics/12rice.html).” And I gave numerous speeches between 2005 and 2008 (for example, [here](http://www.state.gov/s/l/2006/98253.htm), [here](http://2001-2009.state.gov/s/l/rls/104053.htm), and [here](http://2001-2009.state.gov/s/l/rls/111859.htm)) expressing U.S. willingness to support the court’s Darfur investigation and other appropriate cases, while disputing purported ICC jurisdiction over the United States.

The changing U.S. approach to the court did not go unnoticed. The Wall Street Journal quoted me in 2006 (in an article entitled “[U.S. Warms to Hague Tribunal](http://www.wsj.com/articles/SB115024503087679549)”) as saying that “we do acknowledge that it has a role to play in the overall system of international justice.” Later in 2008, the Journal (in an article entitled “[U.S. Accepts International Criminal Court](http://www.wsj.com/articles/SB120917156494046579)”) quoted [lengthy remarks](http://2001-2009.state.gov/s/l/rls/104053.htm) I gave on the tenth anniversary of the Rome Statute in which I argued that ICC members should respect the U.S. decision not to join the court but that the U.S. was prepared to support the court in certain cases. Looking ahead to the court’s second decade, I urged ICC parties and the United States to “seiz[e] opportunities for cooperative efforts where they exist and avoid [...] pitfalls that risk reigniting past tensions.” (The same Journal article quoted John Bolton, who had left the State Department at the end of 2006, as calling my speech “pabulum” that “reflects the yearning the Rice State Department has for acceptance” by academics and foreign intellectuals.)

In his November op-ed, Bolton asserted that “Condoleezza Rice … weakened America’s opposition to the ICC.” By this, he presumably meant that the Bush administration should not have allowed the Security Council to refer the Darfur genocide to the ICC, should not have offered support for the Darfur investigation, and should not have waived restrictions on counterterrorism assistance to ICC members. But these were decisions made by President Bush himself, for moral and pragmatic reasons. And other conservative Republicans have subsequently recognized that the court has a role in international justice: In 2015, Republican [members of Congress agreed](http://www.lawfareblog.com/belated-report-5-million-reward-joseph-konys-transfer-international-criminal-court) to use U.S. taxpayer dollars to pay rewards for the detention and transfer of Joseph Kony and other leaders of the Lord’s Resistance Army to the ICC for prosecution.

Given President Trump’s antipathy towards international law and international organizations, and John Bolton’s particular historic hostility towards the ICC, it would be especially unwise for Fatou Bensouda, the ICC prosecutor, to pick a fight with the United States by launching an active investigation of U.S. activities in Afghanistan and elsewhere. This would be a self-defeating action by the usually sensible prosecutor. She risks returning the relationship between the court and the United States to the nadir it reached between 2002–2004. U.S. public opinion would side with President Trump, and Democrats are unlikely to defend the court, especially in an election year. (Recall that a majority of Democrats, including John Kerry and Hillary Clinton, voted in 2002 for the American Servicemembers Protection Act, including its jingoistic authorization to use military force to free Americans detained in the Hague.) There is a significant risk that the U.S. would cut off all assistance to the court and pressure U.S. allies to do so as well. If Bensouda has boxed herself into a corner such that it is impossible not to start an investigation, she would be wise to limit its scope and profile and acknowledge, rather than criticize, the numerous investigations the United States has already undertaken. Any more provocative actions would hurt the Court and its overall mission.

On the U.S. side, U.S. officials should resist vigorously, but quietly, any aggressive ICC investigation of the United States, including by sharing appropriate information about investigations that the U.S. has already conducted. They should avoid unnecessary and noisy counter-reactions that would return U.S.-ICC relations to the ice age. The ICC is a flawed institution and needs reforms; however, as President Bush and the Bush administration came to recognize, it still plays an important role in investigating and prosecuting genocide and grave human rights atrocities that would otherwise go unprosecuted. What former U.N. ambassador (and former Republican senator) Henry Cabot Lodge Jr. once said about the United Nations is equally applicable to the ICC: “This organization is created to prevent you from going to hell. It isn’t created to take you to heaven.”