US Visa Ban: A Blow or Unlikely Win for the ICC?

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Since taking office in 2012, International Criminal Court prosecutor Fatou Bensouda has spent a lot of time on the road, pursuing potential cases in countries as disparate as Mali, Colombia and the conflict-torn Central African Republic. The one place she may not be visiting anytime soon is the United States.

After warning of overreach months before, Washington acted last week in response to the ICC prosecutor's initial examination into alleged war crimes in Afghanistan involving U.S. personnel.

"The ICC is attacking America's rule of law," said Secretary of State Mike Pompeo, as he announced visa restrictions on those connected to ICC investigations involving U.S. citizens, and urged the court in The Hague to "change course" or face the threat of further sanctions.

Washington's move has been described as both a blow to international justice and a win for democracy. Some see it as further weakening an already battered institution set up as a "court of last resort" to deliver justice for victims of some of the world's most horrific crimes.

Still others see Washington's reprimand as paradoxically boosting the ICC's credentials in the eyes of a broader public, including critics in Africa.

"When the Trump administration or any U.S. administration says, 'Hey, we don't want anything to do with this court because it might investigate us or our personnel,' it's signaling to the rest of the world that the court is doing the right thing," said ICC specialist and University of Toronto fellow Mark Kersten. "Rather than kowtowing to major powers, it's actually challenging them."  
  
Losing members

The U.S. rebuke came the same day Malaysia signaled it was reversing course, announcing it would not join the court after all, following pressure from its Muslim population.

Two other countries, the Philippines and Burundi, have quit the ICC, after coming under preliminary examinations by ICC prosecutors who have pledged to continue them nonetheless. Russia withdrew its signature in 2016, after the court published a report classifying its annexation of Crimea as an occupation.

The court has also suffered a series of judicial setbacks, losing high-profile cases against Kenya's President Uhuru Kenyatta, ex-Congolese Vice President Jean-Pierre Bemba and most recently former Ivorian leader Laurent Gbagbo.

For its part, Washington signed but never ratified the Rome Statute that founded the tribunal in 2002. Ties warmed under the Obama administration, with the U.S. assisting ICC efforts to bring Uganda's Lord's Resistance Army rebel leaders to justice.

Trump a strong critic

The Trump administration has been strongly critical of the ICC. With the tribunal considering whether to open a formal war crimes probe in Afghanistan, National Security Advisor John Bolton warned in September that any investigation involving American personnel threatened U.S. sovereignty and national security.

"We will not cooperate with the ICC," said Bolton, a long-time court skeptic. "For all intents and purposes, the ICC is already dead to us," he added.

Rights groups and ICC member states have denounced Washington's stance. Foreign ministers from nearly two dozen mostly European nations endorsed a statement expressing "serious concern" about the visa revocation, and backed the ICC as part of "the rules-based international order."

"It's an outrageous attempt to bully the International Criminal Court and deter scrutiny of U.S. conduct," said Human Rights Watch Associate Director Liz Evenson, echoing similar criticism from other rights groups.  
  
ICC out of line?

Some analysts, however, argue the ICC, and not the U.S., is out of line.

"Should an unaccountable United Nations court, created by a treaty to which the United States is not a signatory, and that the [U.S.] Senate has not ratified, be allowed to investigate, try and imprison American citizens?" asked *Washington Post* columnist Marc Thiessen, a fellow at the conservative American Enterprise Institute.

"By taking on the ICC, the Trump administration is not just protecting U.S. citizens and American sovereignty – it is striking a blow for democracy across the world," he wrote in *The Post* last year. He argued the ICC also prevents peaceful democratic transitions by closing off amnesty and other options that might remove dictators from power.

For her part, Bensouda has vowed to continue with her probes. According to reports, she will still have access to United Nations headquarters in New York.

"There will be pushback, there will be challenges, there will be accusations … all sorts of things thrown against the ICC," Bensouda said in an interview with Africanews TV this week.

She said the court had an obligation to pursue war crimes and crimes against humanity "if the state is not doing it, or not genuinely doing it."

"At the end of the day," she added, "the cases we try at the ICC are about the victims."

Evenson of Human Rights Watch argues the prosecutor has not overreached when it comes to Afghanistan, an ICC member state.

"We're talking about a situation in which there's been impunity for abuses committed to all parties in the conflict — it would be about much more than U.S. conduct," she said. "It would also allow the prosecutor to look at abuses committed by the Taliban and Afghan national forces."

Muting critics

The U.S. scrutiny might also help mute criticism that the court is overly focused on African cases, says the University of Toronto's Kersten. He also contrasts Washington's response with that of Britain, which also faces a preliminary ICC examination into war crimes allegations involving its soldiers in Iraq.

"The UK did not become hysterical," he said. "Instead it has sought to cooperate with the court, by and large."

More worrisome, he said, would be the message sent if the ICC did not act.

"Had the prosecutor said, 'Look, I'm closing the preliminary examination and not pursuing any investigation of these crimes in Afghanistan' — how would that make the court look right now?" Kersten said. "That would be very bad for the court and its legitimacy."