America and the International Criminal Court

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The International Criminal Court is back as a central issue of debate in American foreign policy. But the debate this time not only influences American interests but also the interests of its key allies especially, Israel. In March, Secretary of State Mike Pompeo warned that Washington would put restrictions on any ICC staff member who investigated U.S. or allied personnel. This month, the Department of State revoked the U.S. visa of Fatou Bensouda, the ICC’s chief prosecutor, after she declared her intention to conduct an investigation of U.S. soldiers in Afghanistan.

Since the ICC was created in 1998 through an international treaty, known as the Rome Statute, the U.S. has been highly ambivalent about the idea. The Western powers advanced it in the aftermath of the failure of the UN to prevent genocide during 1994 and 1995, with the slaughter of 8,000 Bosnian Muslims in Srebrenica, during the Balkan Wars, and the mass murder of 800,000 members of the Tutsi tribe in Rwanda by that country’s Hutu majority. The court was established amidst growing calls to put an end to impunity for those who engaged in the mass slaughter of civilians or ethnic cleansing as well as other heinous acts.

True, President Bill Clinton signed the Rome Statute in 2000. But he did not send it to the U.S. Senate for ratification, which would have been necessary for it to become a binding commitment of the United States.

In 2002, the Bush administration took this one step further, notifying the UN Secretary General that the U.S. no longer had any intention of ratifying the Rome Statute. The architect of U.S. policy on the ICC then and now was John Bolton.

The ICC has been based on the principle of complementarity—that is, it only has jurisdiction if an alleged crime occurred in a state that has no effective legal system to prosecute it, due to a lack of capacity or political will. Nonetheless, American critics rightfully are concerned that the ICC could be abused so that warrants could be issued to drag American military personnel in front of the court, regardless of the fact that the U.S. military has its own system for investigating allegations.

Israel’s concerns have been similar to those of the U.S., due to its bad experience with multilateral institutions in the past that have made baseless allegations against IDF soldiers to the effect that they engaged in war crimes. The UN Human Rights Council issued the Goldstone Report in 2009 asserting that Israeli soldiers deliberately killed Palestinian civilians in Gaza. Subsequently, Justice Goldstone renounced this central conclusion contained in his own report. But the experience served as a warning of how international investigations can be abused and colored by the prejudices of those involved.

The U.S. has been cognizant of the dangers that an abused ICC could pose for Israel. U.S. law prohibits economic support for the PA if it prompts a process that places Israelis under an ICC investigation. Such an initiative would also provide grounds for closing the PLO’s Washington offices as well, which occurred in September 2018.

Both the U.S. and Israel have been concerned with the politicization of the ICC. At the time of the vote for the Rome Statute, the head of the Israeli delegation, Judge Eli Nathan, explained how politicization of the ICC’s founding document caused Israel, a proponent of the court, to vote against it. Nathan, who was a Holocaust survivor, spoke about leading Jewish legal minds who, after the Holocaust, called for bringing war criminals to justice. He saw the ICC emanating from Jewish ethics, and concluded: “This was…our idea.”

But the Rome Statue went beyond the most heinous crimes like genocide, aggression, war crimes, and crimes against humanity, and gave the ICC jurisdiction on political issues like settlements. Plenty of third world countries backed this change, but it was inconsistent with what the original drafters had in mind.

In 1998, during discussions over the text of the Rome Statute, the issue raised was settlements, but the debate between states over the ICC illustrated that any political issue might be converted into a legal weapon through the mechanism of the ICC. The U.S. has been aware of this problem, which explains why, like Israel, it could not back what started as a noble cause but later became a seriously flawed idea.