US Should Ignore the ICC, Not Sanction It

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There are two views emerging of the U.S. decision this week to impose [sanctions](https://www.bbc.com/news/world-us-canada-54003527) on two top International Criminal Court officials, escalating a diplomatic and now economic war that has been simmering for [more than a year](https://www.bloomberg.com/news/articles/2020-06-11/trump-backs-sanctions-on-some-international-criminal-court-staff?sref=EP6bV7CS).

For President Donald Trump’s critics, it’s another example of his administration’s reckless unilateralism. "With its action today," reads [a statement](https://ccrjustice.org/home/press-center/press-releases/us-sanctions-icc-prosecutor-constitute-full-frontal-attack-rule-law) from the Center for Constitutional Rights, "the United States makes clear that it stands with dictators and war criminals, and not with victims of genocide, crimes against humanity, and war crimes."

For the Trump administration, the new sanctions imposed on Fatou Bensouda and Phakiso Mochochoko are a necessary defense of U.S. sovereignty from an illegitimate and politicized international court.

As U.S. Secretary of State Mike Pompeo [said this week](https://www.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/), the court’s decision last year to reopen an investigation into allegations that U.S. military and intelligence officials tortured detainees in Afghanistan "threatens our sovereignty and poses a danger to the United States and our allies."

Pompeo’s understanding of the case is closer to the mark than the indignation from the Center for Constitutional Rights. But both sides miss a broader point: The court itself is largely powerless. It has issued only eight [convictions](https://www.icc-cpi.int/about) in its 20-year history.

Its verdicts are at best a nuisance for the thugs in its crosshairs. And even if this were not the case, the U.S. is not a party to the Rome Statute that created the ICC in 1999.

In this respect, the U.S. sanctions against the court invest it with a kind of legitimacy it doesn’t have. There is little risk that any U.S. soldiers or spies who may be found guilty of war crimes by the tribunal would ever face serious risks of extradition.

In the early 2000s, the U.S. launched a successful campaign to get allies to agree not to recognize the court’s jurisdiction over U.S. forces.

At the same time, the argument that resisting the court’s investigation of U.S. conduct in Afghanistan puts it on the side of dictators and war criminals doesn’t quite work, and recent U.S. history shows why.

When journalists first wrote about the torture of detainees by U.S. forces, it became a huge scandal. The U.S. Justice Department revoked legal findings that authorized the practice.

In his first term, former President Barack Obama ended the so-called black site program altogether. In 2014, the Senate Intelligence Committee released [a detailed report](https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf) on torture that put the once-secret program on the public record for all time.

It should be said that no senior officials have been prosecuted for authorizing the torture program. And Trump’s decision last year to pardon a Navy SEAL convicted of war crimes undermines the broader accountability of the U.S. military justice program.

But these gaps in accountability do not make the U.S. the equivalent of a country such as North Korea, which has no accountability for state war crimes at all.

More important, defenders of the ICC also have to account for the rights of the Americans accused. In the U.S., they have a right to a trial by a jury of their peers.

The ICC has no jury at all. The verdicts of the court are meted out by its judges, some of whom come from countries that do not adhere to Western legal traditions. U.S. citizens subject to such proceedings would be justified in seeing them, to use Pompeo’s term, as "illegitimate."

Beyond its illegitimacy, the ICC also fosters a dangerous illusion. Justice for wicked leaders and war criminals cannot be adjudicated in a courtroom. War and revolution are how tyrants face justice in the real world. The ICC allows powerful nations to support a gauzy notion of justice without making the hard sacrifices necessary to bring actual justice about.

Consider [the case of](https://www.bloomberg.com/opinion/articles/2019-04-12/sudan-s-bashir-ousted-now-the-military-must-give-up-rule?sref=EP6bV7CS) Omar al-Bashir, Sudan’s former tyrant.

In 2010, the ICC issued a warrant for his arrest. But he continued to travel in the region, and even countries that were a party to the Rome Statute never sent him off to the Hague. It took a democratic uprising last year in Khartoum to make his trial a possibility. The new government has said that it seeks to cooperate with the ICC [prosecution](https://www.thenational.ae/opinion/comment/omar-al-bashir-inches-closer-to-facing-justice-1.1070869), but only if the trial is held in Sudan.

An even better outcome, for al-Bashir and tyrants like him, would be for a national court to take over their prosecution. Al-Bashir’s crimes were primarily against his own people.

In Sudan and elsewhere, the people themselves should have the satisfaction of delivering justice to their oppressors.