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SNAPSHOT

America's Honeymoon with the ICC
Will Washington's Love for International Law Last?

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Chief Prosecutor Fatou Bensouda (left) sits in the ICC courtroom in the Hague. (Courtesy Reuters)

Earlier this month, the Brookings Institution hosted [1]what would have been unthinkable a decade ago: a fulsome discussion, at times an outright lovefest, between officials from the U.S. government and the International Criminal Court (ICC). Fatou Bensouda, the chief prosecutor of the ICC, lauded Washington for bolstering the court’s efforts to bring war criminals to justice. In turn, Stephen Rapp, the U.S. war crimes ambassador, declared, “Every one of the situations in which arrest warrants have been issued [by the ICC] merit the support of the United States.”

For the first time, the United States is not only cooperating with the ICC but encouraging cooperation and information-sharing with the court, which is based in The Hague. In March, Bosco Ntaganda, a rebel leader in the Democratic Republic of the Congo wanted by the ICC since 2006 for war crimes and crimes against humanity, surrendered to the U.S. embassy in Kigali, Rwanda. Despite the Rwandan government’s opposition to the ICC, U.S. officials quickly transferred Ntaganda into ICC custody. Less than two weeks later, Washington announced [2] an expansion of the Rewards for Justice program, offering up to five million dollars for information that leads to the arrest, transfer, and conviction of Joseph Kony, the leader of the Lord’s Resistance Army (LRA), and others wanted for arrest by the ICC. Moreover, the expansion of the program had the support of congressional Democrats and Republicans, including the prominent Republican Senator Lindsey Graham.

In short, although the United States is not a party to the ICC’s charter, the Rome Statute, it is arguably doing as much as, if not more than, member states are doing to bolster the work of the court. The Obama administration’s support stands in stark contrast to the high-profile assault that the George W. Bush administration waged against the ICC from 2001 to 2005. At the prodding of John Bolton, who served as undersecretary of state and then as U.S. ambassador to the UN, Washington denounced the Rome Statute and, by threatening to cut off military assistance, secured so-called Article 98 agreements from dozens of governments, promising that they would never send U.S.
citizens to the ICC. At the same time, Congress passed the American Service-Members’ Protection Act, which prohibits cooperation with and funding of the court.

Over Bolton’s objections, U.S. opposition softened during Bush’s second term. In 2005, Bush did not veto the UN Security Council’s referral of the Darfur conflict to the court. In addition, Secretary of State Condoleezza Rice opened channels of communication with ICC officials. Publicly, however, Washington maintained an arm’s-length relationship and, signaling continuing rejection of the court’s legitimacy, refused to send U.S. officials to observe the annual ICC meetings.

The Obama administration has not only walked back Bush-era policies but has actively sought out opportunities to help the court. U.S. officials enthusiastically attend the ICC’s annual meetings of its member states and no longer seek Article 98 agreements. They speak in support of the court at the UN Security Council. In February 2011, Washington voted with a unanimous UN Security Council to refer the worsening situation in Libya [3] to the ICC. The same year, Obama sent 100 U.S. military advisers to central Africa to train local troops tracking down Kony and other members of the LRA wanted by the ICC.

Even more remarkable, the administration’s embrace of the court has been met with little, if any, resistance from Congress. It seems that key members of Congress now recognize that atrocity prevention must include criminal justice mechanisms, and that they may even support the ICC’s work when it overlaps with issues of congressional concern -- such as hunting down the LRA in northern Uganda. It is also possible that members of Congress have simply lost interest in the battle against the ICC. Given Congress’ quiescence, Obama should look to expand Washington’s authority under the ASPA to cooperate with the ICC, including by helping to fund ICC investigations and prosecutions that serve U.S. interests.

In addition, onlookers might argue that, because of the recent change in attitudes, the time is ripe for the United States to ratify the Rome Statute and become an ICC member state. In theory, ratification has advantages, as it would afford Washington an opportunity to populate the court with American judges and prosecutors who could shape the development of international criminal law and exercise influence over the ICC’s actions.

However, even ardent ICC supporters recognize that seeking ratification would be the wrong move at this time. Congress is unlikely to support joining an institution that hypothetically could investigate and prosecute U.S. citizens. And Congress is generally skeptical of international obligations; it recently rejected the UN Disabilities Convention, even though it was modeled on the Americans with Disabilities Act of 1990. To quash the agreement, Senate Republicans, echoing a long-held conservative attitude toward treaties, raised unfounded fears [4] that the convention would allow UN bureaucrats to violate U.S. sovereignty. If senators blocked even this relatively uncontroversial international agreement, there is little chance that they would sign off on a global criminal court.

Furthermore, even without a ratification effort, certain developments could rekindle congressional opposition of the ICC. For example, if Palestinian leaders renew their request for an ICC investigation into Israel’s actions in the West Bank and Gaza, including into settlement activity, Congress will almost certainly pressure the administration to walk back its support of the court. A court investigation into alleged crimes committed by U.S. and allied forces in Afghanistan, an ICC member state, would spark similar opposition.

For now, the United States is deepening its relationship with the court. The Obama administration believes that the
ICC is critical to bringing to justice those accused of war crimes, crimes against humanity, and genocide. It makes sense that Washington supports a court pursuing the likes of Joseph Kony and, for the most part, ignoring alleged abuses committed by Americans and U.S. allies. Should the ICC act counter to U.S. interests, however, Washington’s support may not come so easily.

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