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The Trump Administration and the International Criminal Court: A Misguided New Policy

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THE TRUMP ADMINISTRATION AND THE INTERNATIONAL CRIMINAL COURT: A MISGUIDED NEW POLICY

*Milena Sterio**

CONTENTS

I. INTRODUCTION	201
II. BACKGROUND ON THE ICC	202
III. BOLTON'S REMARKS AND THE NEW AMERICAN POLICY ON THE ICC	203
IV. CONCLUSION: A BETTER POLICY VIS-À-VIS THE ICC: CONSTRUCTIVE ENGAGEMENT	210

I. INTRODUCTION

In a recent speech, National Security Advisor John Bolton delivered remarks on “Protecting American Constitutionalism and Sovereignty from International Threats.”¹ In his remarks, Bolton announced a new American policy vis-à-vis the International Criminal Court (ICC or Court). According to Bolton, the ICC “has been ineffective, unaccountable, and indeed, outright dangerous.”² While Bolton, and others in the Trump Administration, are at liberty to craft new policies, it is important that such policies be based on accurate facts, and on an accurate understanding of the law. This Article will highlight factual errors from Bolton’s remarks, and it will criticize some of Bolton’s arguments as misguided and contrary to the United States’ interests. In order to do so, this Article will first provide a brief background on the establishment and jurisdictional mechanisms of the ICC (Part II). Next, this Article will analyze Bolton’s remarks and the new American policy, announced therein, regarding the ICC (Part III). Finally, this Article will propose how the United States could engage more constructively with the ICC, and

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1. John Bolton, Nat’l Sec. Advisor, Speech at the Federalist Society in Washington D.C. (Sept. 10, 2018), *available at* <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/> [https://perma.cc/NP6P-2USM] [hereinafter “Bolton’s Remarks”].

2. *Id.*

how such engagement would advance American interests (Part IV). This Article will conclude that the newly announced policy vis-à-vis the ICC will be detrimental to the United States' interests in the global community, as well as destructive for the global fight against impunity.

II. BACKGROUND ON THE ICC

The ICC is the only permanent international criminal tribunal.³ Its Statute (“Rome Statute”) was negotiated in 1998, and the Court became operational in 2002.⁴ The ICC is located at The Hague, and the Rome Statute provides that the Court has prospective jurisdiction, starting in 2002.⁵ The Court can properly exercise jurisdiction over situations where crimes have been committed on the territory of an ICC state party, or where crimes have been committed by a national of an ICC state party.⁶ In terms of subject-matter jurisdiction, the Court can prosecute individuals accused of four main categories of crimes: genocide, crimes against humanity, crimes of aggression, and war crimes.⁷ Starting in 2017, the crime of aggression was added to the Court’s Rome Statute, although negotiations surrounding the addition were contentious and resulted in a complex mechanism, whereby states can opt out of jurisdiction over this crime.⁸ Cases can appear before the ICC in three different ways: the United Nations Security Council can refer a case to the ICC prosecutor; any state party to the ICC can refer a case to the prosecutor; or, the prosecutor can initiate an investigation on her own.⁹ Thus far, the ICC has investigated or prosecuted over twenty-six individuals and eleven situations.¹⁰

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3. INT’L CRIM. COURT, <https://www.icc-cpi.int/about> [<https://perma.cc/4LWM-EAYN>].
 4. *Id.*
 5. *Id.*
 6. Rome Statute of the International Criminal Court art. 12, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. This pre-condition to the exercise of ICC’s jurisdiction does not apply to cases which are referred to the Court by the United Nations Security Council. *Id.*
 7. Rome Statute, *supra* note 6, art. 5.
 8. For a detailed discussion of negotiations regarding the addition of the crime of aggression to the Rome Statute, see Jennifer Trahan, *From Kampala to New York—The Final Negotiations to Activate the Jurisdiction of the International Criminal Court over the Crime of Aggression*, 18 INT’L CRIM. L. REV. 197 (2018).
 9. Rome Statute, *supra* note 6, art. 13.
 10. *Situations and Cases*, INT’L CRIM. CT., <https://www.icc-cpi.int/#> [<https://perma.cc/68EV-NVZP>].

The ICC's reach is further limited by two conditions related to admissibility of cases: gravity and complementarity.¹¹ As it will be discussed below, in order for a case to be admissible before the ICC, such a case needs to involve crimes of sufficient gravity; moreover, national jurisdictions can preempt an ICC prosecution, by notifying the Court that they are able and willing to investigate the relevant case: the principle of complementarity.¹² Thus, these principles—gravity and complementarity—pose an additional admissibility hurdle for potential ICC prosecutions.

III. BOLTON'S REMARKS AND THE NEW AMERICAN POLICY ON THE ICC

National Security Advisor John Bolton delivered a speech on September 10, 2018, in which he announced a new United States' policy vis-à-vis the ICC.¹³ Bolton's remarks contained several errors regarding the ICC's structure, jurisdictional reach, and internal accountability mechanisms. This section will outline some of these errors. In addition, this section will highlight some of Bolton's remarks that contained new policy guidelines vis-à-vis the ICC, where such guidelines are misguided and detrimental to United States' interests.

Bolton argued in his speech that “[t]he ICC and its Prosecutor had been granted potentially enormous, essentially unaccountable powers, and alongside numerous other glaring and significant flaws, the International Criminal Court constituted an assault on the constitutional rights of the American People and the sovereignty of the United States.”¹⁴ It is incorrect that the ICC and its Prosecutor have “enormous” or “unaccountable powers.” The ICC's jurisdiction is limited temporally as well as *rationae materiae*: the Court has prospective jurisdiction, starting in 2002, and it can only exercise jurisdiction over genocide, crimes against humanity and war crimes.¹⁵ The crime of aggression was recently added to the Court's Statute, but the addition was complex and will require states to “opt-in” to

11. Rome Statute, *supra* note 6, art. 17.

12. *Id.*; see also David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT'L L. 1281, 1293 (2009) (discussing the principle of complementarity and its implications for the International Criminal Court).

13. Bolton's Remarks, *supra* note 1.

14. *Id.*

15. Rome Statute, *supra* note 6, arts. 5, 11. As mentioned above, the crime of aggression has been added to the Rome Statute in 2017, although states can elect to opt out of jurisdiction over the crime of aggression. Trahan, *supra* note 8.

jurisdiction over this new crime.¹⁶ In addition, the ICC is constrained by the application of principles of gravity and complementarity.¹⁷ The ICC was established to exercise its jurisdiction over persons for the most serious crimes of international concern. Article 17(1)(d) of the Rome Statute provides that a case is inadmissible before the ICC if the case is not of sufficient gravity to justify further action by the Court.¹⁸ Thus, cases which involve less “serious” crimes may not satisfy the ICC’s gravity threshold and may never be prosecuted before this Court.¹⁹ In addition, the ICC is not supposed to interfere with national prosecutions, and the Court should only prosecute suspects if a state is not able or willing to prosecute.²⁰ According to Article 17(1)(a) of the Rome Statute, a case is inadmissible when it is being investigated or prosecuted by a state that has jurisdiction over it, unless the state is genuinely unwilling or unable to carry out the investigation or prosecution.²¹ In other words, if a state is able and willing to prosecute an individual, that state should be given the opportunity to do so, and the ICC should step away.²² Thus, in light of the Court’s jurisdictional limitations as well as important admissibility requirements, it is inaccurate to claim that the ICC has “enormous” powers.

Moreover, it is incorrect to claim that the ICC has “unaccountable” powers. The Assembly of States Parties, consisting of states which are members of the ICC, is an important accountability mechanism over the Court.²³ For example, judges can be removed by a two-thirds vote of states parties to the Rome Statute, and a prosecutor can be removed by a majority vote of states parties.²⁴ Thus, to claim that the ICC somehow wields super-powers which transcend any accountability is simply false.

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16. For a detailed account of negotiations to add the crime of aggression to the Rome Statute, as well as the complex opt-out procedure available to ICC member states regarding jurisdiction over the crime of aggression, see Trahan, *supra* note 8.
 17. Rome Statute, *supra* note 6, art. 17.
 18. *Id.*
 19. For a detailed analysis of the ICC’s application of the gravity threshold, see Margaret M. DeGuzman, *The International Criminal Court’s Gravity Jurisprudence at Ten*, 12 WASH. U. GLOBAL STUD. L. REV. 475 (2013).
 20. Rome Statute, *supra* note 6, art. 17.
 21. *Id.*
 22. Tolbert, *supra* note 12, at 1288-89.
 23. *Assembly of States Parties*, INT’L CRIM. CT., <https://www.icc-cpi.int/asp> [<https://perma.cc/QS2Q-5QLG>].
 24. Rome Statute, *supra* note 6, art. 46.

Finally, it is unclear why the establishment of the ICC constitutes a constitutional and sovereignty assault against the United States. The ICC is a treaty-based body; any state, including the United States, is free to join or not to join this treaty. If the United States chooses to join the ICC, or any other treaty, potential conflicts with the U.S. Constitution would be resolved through the Supremacy Clause, which establishes the primacy of the Constitution over any inconsistent treaty obligations.²⁵ Thus, it is surprising and misleading to claim that the negotiation of a new treaty, like the ICC, is somehow a threat to the United States' sovereignty or the role of its Constitution.

Bolton also argued that, "the Court's structure is contrary to fundamental American principles, including checks and balances on authority and the separation of powers.... The International Criminal Court, however, melds two of these branches together: the judicial and the executive. In the ICC structure, the executive branch—the Office of the Prosecutor—is an organ of the Court. The Framers of our Constitution considered such a melding of powers unacceptable for our own government, and we should certainly not accept it in the ICC."²⁶ This is a curious argument: while it may be true that the ICC does not espouse the same separation of powers structure that the United States government does, the United States cannot possibly expect that every treaty-based organization adopt American governance principles. Multilateral treaties bind multiple nations together and often adopt compromise positions and the "lowest common denominator" of norms;²⁷ it is not reasonable to expect that treaties would replicate United States' constitutional structures.²⁸ And, such replication is not constitutionally mandated. The United States can become a member of various treaty-based bodies, so long as its obligations under such treaty mechanisms do not directly conflict with the Constitution. Nothing in the ICC Statute would create such a constitutional conflict. Thus, Bolton's argument here is both surprising and unsupported by the Constitution.

Moreover, Bolton argued that the ICC "claims 'automatic jurisdiction,' meaning that it can prosecute individuals even if their

25. U.S. CONST. art. VI, § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.").

26. Bolton's Remarks, *supra* note 1.

27. See, e.g., GLOBAL SECURITY AND INTERNATIONAL POLITICAL ECONOMY 143 (P. Bilgin, et al., eds. 2010) (describing the "lowest common denominator" in multilateral treaty negotiations).

28. *Id.*

own governments have not recognized, signed, or ratified the treaty.”²⁹ This is not true either: the ICC does not have automatic jurisdiction. Article 12 of the Court’s Rome Statute posits that a precondition to the court’s exercise of jurisdiction is that the alleged crimes be committed by a national of a state party, or on the territory of a state party (or if a state accepts the court’s jurisdiction).³⁰ Thus, while the ICC may be able to prosecute nationals of a non-party state,³¹ this situation is far from automatic, and may only occur if such nationals commit crimes on the territory of a state party.

Bolton next claimed that the ICC Prosecutor’s request to investigate Americans for alleged detainee abuse in Afghanistan is “an utterly unfounded, unjustifiable investigation.”³² This investigation is not unfounded in and of itself; the investigation will permit the Prosecutor to ascertain enough facts to decide whether to go forward with any possible prosecutions. Moreover, the investigation is not unjustifiable, as it falls within the Court’s mandate, and as potential prosecutions would satisfy the Court’s temporal and subject-matter jurisdiction (the alleged crimes took place after 2002, on the territory of a state party— Afghanistan). If the Prosecutor determined that admissibility requirements, such as gravity and complementarity, were not met, she would not proceed with the case. Thus, the possible investigation of crimes in Afghanistan, which may involve American nationals as perpetrators, is not “unfounded” or “unjustifiable” by any judicial or prosecutorial standards.

Bolton proceeded to criticize the ICC because it “claims jurisdiction over crimes that have disputed and ambiguous definitions, exacerbating the Court’s unfettered powers. The definitions of crimes, especially crimes of aggression, are vague and subject to wide-ranging interpretation by the ICC.”³³ This claim is also inaccurate: the ICC Statute specifically defines the crimes over which the Court has jurisdiction,³⁴ and the interpretation and application of these definitions is appropriately left in the hands of the Court’s judiciary, in the same manner that the interpretation and application of

29. Bolton’s Remarks, *supra* note 1.

30. Rome Statute, *supra* note 6, art. 12.

31. *Id.* at art. 12(3).

32. Bolton’s Remarks, *supra* note 1.

33. *Id.*

34. *See* Rome Statute, *supra* note 6, art. 6-8 (specifically listing crimes which are within the Court’s jurisdiction. Articles 6, 7, and 8 define the crimes of genocide, crimes against humanity, and war crimes. Thus, it is incorrect to claim that the crimes which are within the Court’s jurisdiction are ill-defined or vague).

domestic statutes is bestowed upon domestic judiciaries. Bolton's claim that the definitions of crimes within the ICC's Statute are "disputed," "ambiguous," or "vague" is unsupported within the scholarly community, and unsupported by evidence from the Court's negotiating record.³⁵ The ICC Rome Statute was negotiated over weeks of strenuous academic, strategic and political debates; the Statute's content is the result of impressive compromise and expertise.³⁶ While some definitions of crimes may have been the subject of controversy and academic dispute, the end result was agreed upon by all member states, and has resulted in a Statute which is clear and unambiguous.³⁷ In addition, customary norms of International Criminal Law espouse many of the same definitions of crimes and principles of law which are enshrined in the Rome Statute.³⁸ In sum, Bolton was wrong in his claim that the ICC contains vague or ambiguous definitions of crimes.

In addition, Bolton argued that the ICC would somehow claim universal jurisdiction. "The next obvious step is to claim complete, universal jurisdiction: the ability to prosecute anyone, anywhere for vague crimes identified by The Hague's bureaucrats."³⁹ There is nothing in the ICC's Statute to support this conclusion, and while the Rome Statute negotiating record reveals that different states held different views regarding the Court's reach and structure, it is false to claim that any serious intentions existed to provide the Court with universal jurisdiction over "anyone" or over "vague crimes."⁴⁰

35. For a detailed discussion of the Rome Statute negotiations, see FANNY BENEDETTI ET AL., *NEGOTIATING THE INTERNATIONAL CRIMINAL COURT* (2013); see also Phillippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2 (1999) (discussing the negotiating process for the establishment of an International Criminal Court).

36. *Id.*

37. For a detailed academic discussion of the various substantive provisions of the ICC's Rome Statute, see Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR J. INT'L L. 144 (1999).

38. For a discussion of the relationship between the Rome Statute and customary international law, see, e.g., Jan Wouters, *The Obligation to Prosecute International Law Crimes*, <https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf>; see also Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909 (2000) (discussing the role of Article 10 in international law).

39. Bolton's Remarks, *supra* note 1.

40. For a discussion of the ICC Rome Statute's negotiating history, see BENEDETTI ET AL., *supra* note 35.

Finally, some of Bolton's claims were, while not completely factually inaccurate, misguided and contrary to United States' interests. First, Bolton claimed that the ICC is ineffective, as it has spent too much money, has prosecuted few individuals, and has not deterred the commission of atrocities in places such as the Democratic Republic of Congo, Sudan, Libya, or Syria.⁴¹ This may be a fair criticism of the Court, but accepting such criticism could lead one to adopt a pro-ICC policy: to support the Court, and to ensure that the Court has better funding and better opportunities to truly deter the commission of atrocities, through its investigative and prosecutorial mechanisms.⁴² This approach would benefit both the Court and all states which are committed to principles of accountability and individual criminal responsibility (United States should be positioned as a leader within this group of countries).

Second, Bolton claimed that the ICC is superfluous, because of superior United States' judicial and ethical standards.⁴³ According to Bolton, we do not need the ICC because the United States can handle its own investigations much better.⁴⁴ Bolton argued that the ICC's application of the complementarity principle is "farcical" and that the Prosecutor will decide which investigation to pursue based on political motives.⁴⁵ While the ICC has been criticized on complementarity grounds (in the Libya case in particular), there is nothing to suggest that the Prosecutor does not consider complementarity issues seriously in each case that has been initiated with the Court.⁴⁶ And, even accepting that the United States' judicial system is superior to the ICC, one could imagine a situation where the United States is unwilling to investigate its own wrongdoing; the ICC's role is to act in such situations and to provide justice and accountability against

41. Bolton's Remarks, *supra* note 1.

42. See, e.g., Jane Stromseth, *Why Bolton's Assault on the ICC is Not in the U.S. Interest*, JUST SECURITY (Sept. 14, 2018), <https://www.justsecurity.org/60743/boltons-assault-icc-u-s-interests/> [<https://perma.cc/V39Y-55MM>] (arguing that "the ICC is a very imperfect institution, with many limitations and challenges. But it should not be blamed for the failures that stem from lack of support for its work or matters outside its jurisdiction").

43. Bolton's Remarks, *supra* note 1.

44. *Id.*

45. *Id.*

46. See, e.g., Jennifer Trahan, *Guest Post: A Complementarity Challenge Gone Awry - The ICC and the Libya Warrants*, OPINIOJURIS (Sept. 4, 2015), <http://opiniojuris.org/2015/09/04/guest-post-a-complementarity-challenge-gone-awry-the-icc-and-the-libya-warrants/> [<https://perma.cc/8NWQ-XGRF>] (discussing ICC jurisdiction in the Libya case).

perpetrators whose home countries choose to shield them.⁴⁷ As several commentators have already pointed out, the best thing that the United States can do, if faced with the potential ICC investigation, is to ensure that American perpetrators of potential abuses are thoroughly investigated in the United States' military or criminal system.⁴⁸ In this manner, the principle of complementarity would preclude the ICC from continuing to investigate, because the United States would have demonstrated its willingness and ability to prosecute on its own.

Last but not least, most troubling in Bolton's speech was his threat against those who cooperate with the ICC. "We will respond against the ICC and its personnel to the extent permitted by U.S. law. We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the U.S. financial system, and, we will prosecute them in the U.S. criminal system. We will do the same for any company or state that assists an ICC investigation of Americans."⁴⁹ It is absolutely within the United States' sovereignty to refuse to issue visas/entry to ICC officials who may be foreign nationals (although this would be terrible policy).⁵⁰ However, it is simply unbelievable to announce that the United States would prosecute ICC officials, and other companies or states who assist the ICC in the U.S. domestic system. ICC officials are highly respected experts in international criminal law: judges, prosecutors, investigators, and other individuals who have committed their careers to the pursuit of international justice. Those who assist or have assisted the ICC include our colleagues—the most prominent experts in international criminal law who have provided advice and expertise to the Court. What crimes have such individuals committed under

47. See Stromseth, *supra* note 42 ("Working to build stronger accountability for mass atrocities - in national courts when possible, in hybrid courts, and before the ICC - together can reinforce the fundamental prohibitions against atrocity crimes and bolster prospects for their prevention.").

48. *Id.*; see also Milena Sterio, *Commentary on John Bolton's Speech Regarding New American Policy on the International Criminal Court*, INTLAWGRRLS (Sept. 10, 2018), <https://ilg2.org/2018/09/10/commentary-on-john-boltons-speech-regarding-new-american-policy-on-the-international-criminal-court/> [https://perma.cc/85MW-K42N] (discussing the factual errors within Bolton's Remarks on "Protecting American Constitutionalism and Sovereignty from International Threats").

49. Bolton's Remarks, *supra* note 1.

50. *Know Your Rights: What to do When Encountering Law Enforcement at Airports and Other Ports of Entry into the U.S.*, ACLU, <https://www.aclu.org/know-your-rights/what-do-when-encountering-law-enforcement-airports-and-other-ports-entry-us> [https://perma.cc/6FTD-LBP9].

United States law? And, how would such prosecutions (even if grounded in U.S. law) affect the United States' role in international relations and in the world community? John Bolton's speech is both factually inaccurate as well as misguided, and a new American policy vis-à-vis the ICC, built on Bolton's remarks, will be detrimental to our own interests and our position in the global community.

IV. CONCLUSION: A BETTER POLICY VIS-À-VIS THE ICC: CONSTRUCTIVE ENGAGEMENT

As opposed to stating that the ICC is “dead to us,” as Bolton did,⁵¹ it would be in the United States' interests to constructively engage with the Court and to support its mandate. While the United States is not a state party to the Rome Statute,⁵² nothing precludes the United States from working to support the work of the Court, in order to foster the global goal of ending impunity. The United States could adopt a pro-ICC policy, which would allow the United States to work with the Court—through funding and other investigative and prosecutorial support. In addition, the United States could encourage other countries to support the ICC in a similar fashion. The United States could also work with the Court as well as with other national jurisdictions to build prosecutorial capacity over atrocity crimes, as well as to enhance prospects for their prevention. Such constructive engagement with the court would not undermine United States' interests, and would advance both American and global interests in ending impunity and deterring the commission of atrocity crimes. As Jane Stromseth has argued,

We can protect U.S. personnel and U.S. interests effectively without assaulting and undercutting the possibilities for justice for victims of egregious atrocities that the ICC can offer, or its work in catalyzing meaningful accountability at the national level—the primary and most important foundation for justice and the rule of law.⁵³

In sum, Bolton's newly announced ICC policy is based on erroneous facts. It is misguided, and contrary to the United States' national security interests and to the global goals of justice.

51. Bolton's Remarks, *supra* note 1.

52. *The States Parties to the Rome Statute*, ICC, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [<https://perma.cc/2W6G-X3VM>].

53. Stromseth, *supra* note 42.