



United States Visa Ban on Officials of the ICC: International Criminal Justice on Trial

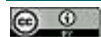
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Abstract

The isolation of the United States (US) from the International Criminal Court (ICC) treaty has dealt a heavy blow on the potency of the Court. By making efforts to frustrate the ICC's activities and withholding support for United Nations (UN) peacekeeping unless United States (US) citizens are exempted from international enforcement arising out of such operations; and mandating other countries to sign treaties such as the "bilateral immunity agreements" that exempts the US citizens from Court proceedings as a criteria for rendering assistance or giving aids, the US makes it more difficult to enforce the laws prohibiting genocide, war crimes, and crimes against humanity. The recent decision by the US to deny officials of the ICC access to its territory, even to the UN headquarters places a further strain on the Court's efforts to achieve international justice. This paper highlights the implications of the US antagonism to the ICC on international criminal justice.

Keywords: International criminal court; United states; Visa ban; Double standard; Justice; Accountability.



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1. Introduction

The US has long been a defender of human rights and rule of law (Scheffer, 1996) and a major player in the realm of international justice and accountability. It was in the forefront of dispensing justice and enthrone accountability in the post War II trials, which was achieved through the International Military Tribunals (IMTs) at Nuremberg and Tokyo (Brown, 1999). Many other alleged war criminals were tried under Control Council Law No. 10, which was another remarkable contribution of the US to the quest for accountability for perpetrators of heinous crimes in that war. In recent times also, the US has been concerned about crimes committed in the theatres of war. This necessitated the creation of the office of Ambassador-at-Large for War Crimes Issues, whose responsibility is to advise and formulate policies on war crimes in other countries (Brown, 2008).

The US was instrumental to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and other ad hoc tribunals in the 1990s and beyond (Brown, 1999). After Iraq was defeated in the Gulf War, its erstwhile president, dictator and mass murderer, Saddam Hussein, was charged for heinous crimes committed against his people, including the use of chemical weapons. The credit for his arrest, prosecution and eventual execution went to the US. The craving for justice was behind the US vociferous criticism of Kenya's effort to evade the jurisdiction of the ICC (Corey-Boulet, 2011). The US thus places high premium on international justice and accountability, hence its declaration of the war on terror and relentless of war criminals. But when it comes to US citizens who are implicated in international crimes, the standard is different. The US is unwilling to subject its personnel to same standards of international justice applicable to citizens of other nations. The US operates double standard – one for its citizens, the other for the rest of the world (Brown, 1999).

The US wants to try its personnel who are alleged to have committed infractions; and rejects any idea of an international criminal trial. It has failed to do so with respect to crimes committed in Iraq and Afghanistan (Human Rights Watch, 2019). The involvement of US forces in those countries has raised the issue of war crimes and crimes against humanity. An attempt by the ICC to exercise its complementary jurisdiction to investigate crimes committed in that country incurred the wrath of the US government. The former US National Security Adviser, John Bolton, vehemently denounced the idea of an ICC inquiry into serious crimes committed by American officials in Afghanistan. Bolton announced serious consequences if such investigation was ever carried out. His comments were later reinforced by the Secretary of State, Michael Pompeo (Trahan, 2019).

The Court has since its inauguration been opposed by successive US governments because they do not want their military and political leaders to be held to a uniform universal standard of criminal justice (Global Policy Forum, 2012). The clampdown by the US is seen as a major snag to the activities of the ICC and a hindrance to its mission of promoting human rights and accountability as well as strengthening international justice system and norms. The US opposition contradicts the fact that it passionately shares the ideals expressed in the Rome Statute. It is also at variance with the fact the US played a remarkable part in the outcome of the treaty, in shaping its character and content (Brown, 1999).

There has been scanty critical scholarly work on the "unsigned" or non ratification of the Rome Statute by the US, which as a matter of fact, is the reason for the hostile treatment of officials of the ICC such as denying them of visas, and threatening to sanction their funds. This work will be driven by the need to interrogate the decision of the US not to support the ICC treaty, while also analysing the effect of that decision on the ability of the Court to

accomplish its objectives of providing justice for the majority victims of human right abuses, war crimes and other barbaric acts that have threatened the very humanity of individuals.

2. The ICC and its Mission

International criminal justice took a giant leap forward when 120 States adopted a treaty to establish an international criminal court on 17 July 1998 (Brown, 1999). The treaty christened the Rome Statute provides for a certain category of international crimes, the rules of procedure and the measures of cooperation with States. The ICC was set up to try individuals involved in the commission of heinous crimes, namely, war crimes, crimes against humanity, genocide and the crime of aggression (Barnett, 2008). The Court is currently building on foundations laid by the *ad hoc* tribunals backed by the UN.

In the period preceding its establishment, many crimes that had violated international law had gone unpunished, (Barnett, 2008) and as such the United Nations General Assembly thought it necessary to establish a court that will ensure proper punishment for the commission of such atrocities; and adopted its founding treaty in 1998 (Felter, 2019). Although international humanitarian law places "universal jurisdiction" on these crimes and States have been vested with the responsibility to punish their perpetrators, the mechanism for ensuring their effective abrogation was lacking. Therefore the Court's universal jurisdiction is a significant stride in the enthronement of global accountability irrespective of the status of the individual. The ICC was inaugurated to complement national judicial framework for the trial of persons implicated in those crimes listed in the Statute. The Court's jurisdiction may only be invoked when national trials are impossible (Felter, 2019).

2.1. The US and ICC; An Uneasy Relationship

In the past few decades, the US led the campaign to end impunity in warfare through international criminal prosecutions (Brown, 1999). The US spearheaded the establishment of the IMTs at Nuremberg and Tokyo to prosecute criminals of the Second World War (Scheffer, 1996). It also offered strong support that climaxed in the inauguration of *ad hoc* criminal tribunals for the defunct Yugoslavia, Rwanda, East Timor and Cambodia (Brown, 1999). It provided material and financial assistance for the work of these tribunals. Reeves (2000), observes that "Prior to the Rome Conference the Clinton administration advocated a world criminal court." The US participated in discussions and consultations that ushered in the ICC (Global Policy Forum, 2012). Though it wanted a court with limited jurisdiction the concessions it requested were not granted. The US had proposed State consent allowing any country to block the prosecution of its citizens; and vetting of cases by the UN Security Council. Consequently, it voted against the treaty in 1998.

2.2. Opposition by Successive Administrations

On December 31, 2000, at the twilight of the administration of Bill Clinton, the US signed the ICC treaty. The administration, however, did not have any desire of transmitting the document to the Senate for ratification (Felter, 2019). The Chairperson of the Senate Foreign Relations Committee expressed the view that the treaty would be dead on arrival in Congress.

With the emergence of the ICC in 2002, the US initiate measures to frustrate it, complaining that the new court would subject United States nationals to politically-motivated international justice (Reeves, 2000). The objection and resistance to the ICC spanned different US administrations, just as the campaign to weaken and undermine the institution. Bill Clinton administration refused to support the Statute and recommended various amendments, which were overwhelmingly rejected by the other participating members. The US felt that if the Statute stood, it was possible that individuals, especially from its armed forces abroad could be persecuted for various criminal acts committed, even in a State that had not ratified the Statute. They felt that there was an inherent danger that unfriendly states might either through revenge or malice instigate prosecution against American citizens (Bradley, 2002).

During the administration of George W. Bush, the rejection of the ICC escalated from non-participation to active opposition. The US denunciation of the Court culminated in the retraction of its signature to the Statute (Bradley, 2002). In May 2002, it disclosed that it had no intention of ratifying the treaty (Barnett, 2008). On 6 May, 2002, officials of the Bush regime informed the UN Secretary-General that the US was withdrawing from the treaty (Felter, 2019) because, as revealed by then Defence Secretary, Donald Rumsfeld, it was distasteful to the American people. In a statement, Rumsfeld said that the Court was not under any duty to uphold the constitutional rights of American citizens (Bradley, 2002).

The American government's withdrawal of signature was immediately followed by a crusade to enfeeble the ICC. The US launched an adversative crusade against the Court just before its statute became operational by vetoing the UN peacekeeping mission in Bosnia which was due for renewal. The US demanded immunity from prosecution for its military personnel in return for supporting the renewal of the UN mission. Former President George W. Bush unwaveringly demanded a Security Council resolution excluding UN peacekeepers from the jurisdiction of the ICC and to insert an exemption clause in each renewal of peacekeeping missions (Trahan and Egan, 2003). The request was backed by a threat of veto. The Security Council yielded by adopting Resolution 1422 in July 2002, offering a 12-month comprehensive immunity as requested. Faced with the threat of veto, the immunity was repeated for another year. Further renewal in 2004 was, however, refused following the mistreatment of prisoners in Iraq and Guantanamo Bay, Cuba.

In a bid to shield its personnel from the ICC's jurisdiction, the US initiated additional measures to further cripple the Court, one of which was the enactment of the American Service-Members' Protection Act (ASPA) on 2 August 2002 (Ireland and Bava, 2016). The law which limits US collaboration with the Court is intended to protect US military personnel and other elected and appointed officials of the US government against criminal prosecution by an international criminal court to which they are not a party (Elsea, 2006). It curtails certain military aid to States that have ratified the treaty; regulates US involvement in UN peacekeeping operations; and allows the US to deploy an armed force to release its personnel detained by the Court (Elsea, 2006).

In 2002, the Bush Administration demanded all states to sign agreements excluding personnel of the US from standing trial before the Court and threatened sanctions if they failed to do so (Nooruddin and Payton, 2010). In addition, it introduced the Nethercutt Amendment in 2004 withdrawing a wide spectrum of assistance to States that did not sign the agreement on immunity. The US also concluded bilateral so-called Article 98 no-extradition agreements with a large number of States, thereby seriously undermining the ICC's capacity to exercise jurisdiction on the basis of the Rome Statute (Trahan and Egan, 2003).

When Barrack Obama assumed the presidency, the US adopted a relaxed posture to the difficult relationship with the ICC (Global Policy Forum, 2012). It held back its veto in 2005 in relation to the situation in Darfur (Barnett, 2008). In January 2009, former Secretary of State, Hilary Clinton declared that the US will end its hostility concerning the ICC. Towards the end of 2009, the US began to take part in the activities of the Court; and assumed an observer status in the Assembly of States Parties. In 2011, US supported the UN Security Council's referral of the situation in Libya to the ICC (Human Rights Watch, 2019). It offered assistance in the handover of Congolese warlord, Bosco Ntaganda in 2012 and another rebel leader, Dominic Ongwen in 2015. The US Congress included the ICC in its expanded crimes rewards programme in 2013.

2.3. Reasons for US Objection to the Rome Statute

The principal complaint against the ICC is the likely assumption of jurisdiction over US personnel accused of heinous crimes in combat zones (Global Policy Forum, 2012). Such jurisdiction, the US fears, may also be exercised over officials responsible for foreign policy formulation and implementation. The fear of being charged by the ICC, it has been argued, could hinder the US from embarking on military adventures and foreign policy agenda, thereby infringing on its sovereignty. A deeper inquiry into the excuse depicts the unwillingness by the US to accept responsibility for serious breaches of human rights or to be held to a globally recognized standard (Elsea, 2006).

Over the years, the US has played a preponderant role in multilateral military operations in such hot spots as Iraq, Afghanistan and Kosovo. American military capabilities and political influence increase the exposure of its forces deployed internationally. This makes the US and its personnel highly fallible to being guilty of war crimes and atrocities that they might have committed out of necessity. This explains why even though the US470 contributed immensely to the outcome of the Treaty (CCHR Policy Working Paper). The feeling that this might be an avenue for second-guessing controversial US military command decisions is one of the primary reasons for its objections to the Rome Statute. In addition to the above, there are other US grievances against the Court.

2.3.1. Insufficient Protection against Politicised Prosecution

The perceived imperfection in the ICC may provide a platform for spurious charges to be launched against Americans. This may be predicated on the fact that the US occupies an outstanding place in global affairs and this makes its citizens vulnerable to frivolous allegations and charges (Grossman, 2002). As obtainable in Jennifer (Elsea, 2006) CRS report for congress: The objection stems from the apprehension that American personnel are likely to be marked for prosecution (Bradley, 2002)

2.3.2. Lack of adequate checks and balances

Closely associated with fears of politically motivated prosecution is the independence of the prosecutor; unrestrained capacity to institute investigations; and absence of control by a distinct political entity (Gurulé, 2002). The US argued that the Rome Statute established an "unaccountable prosecutor" with an "unchecked power" (Rozenberg, 2006). At the Rome Conference, the US had proposed a supervisory work for the UN Security Council, that of curbing the excesses of rash ICC officials. The aim of the proposal was to curtail the politicisation of prosecutions. In other words, the ICC should be responsible to the UN (Bradley, 2002).

Usurpation of the role of the UN Security Council

A contentious issue which is yet to be resolved by States revolves around the definition of aggression. The Rome Statute gives the Court the authority to define and punish the crime of "aggression," which is solely the prerogative of the Security Council under the UN Charter (Grossman, 2002). This has created a problem and tension as to the definition adopted by the Rome Statute and the one preferred by the Security Council. One of the impediments to a normal relationship between the US and ICC is the squabble around the definition of the crime of aggression and whether the ICC should prosecute it (Evans-Pritchard and Simon Jennings (2010).

2.3.3. Lack of Due Process Guarantees

Due process ensures the protection and enforcement of rights. The US worries about frailty in due process, among them absence of jury, acceptance of hearsay evidence and likelihood of bias (Carpenter, 2014). Supporters of the US administration argue that the ICC will not offer accused Americans the due process rights guaranteed them under the US Constitution (Carpenter, 2014).

2.4. Supporters of the ICC Respond to US Grievances

Supporters of the Court have responded appropriately to the contentious issues formulated by the US. The crimes under consideration are also proscribed under general international law. Accordingly, under the doctrine of universal jurisdiction, any State may assume jurisdiction over individuals who commit any of those heinous crimes. American national involved in the commission of crimes abroad are likely to be charged in that country. In this circumstance, the ICC is simply exerting the collective jurisdiction which is also available to individual States.

It is also an undisputed fact that the ICC does not replace national judicial systems. It exercises a complementary jurisdiction to that of national courts. Thus the ICC would not try an American citizen if the US authorities are able and willing to investigate and prosecute them. The US fears that the prosecutor not being under external control may act without restraint thereby exposing American citizens to politically motivated prosecution are also debunked. This assertion has been debunked by proponents of the ICC. According to them, it is imperative for the prosecutor to first obtain the approval or consent of the pre-trial chamber judges before an investigation is launched. This acts as a restraint on the prosecutor and prevents frivolous charges (Brown, 1999). The independence of the prosecutor is critical and must be detached from external political control such as that of the UN Security Council (Elsea, 2006). Most States that took part in the Rome Conference rejected the involvement of the UN Security Council. Situations referred to the Security Council would be highly politicised, inundated with impunity, selective justice and abuse of the veto power by the permanent members (Elsea, 2006).

The current Trump administration is suggesting that if the US joins the ICC they surrender their national sovereignty. That is not the case, as the ICC has not divested the US of its sovereignty. Advocates of the Court argue that its role is to complement national systems; and its jurisdiction can only be invoked if States fail to prosecute perpetrators in their own courts (Park, 2019). The precedence accorded States actually recognise and reinforce sovereignty. With regards to appropriate safeguards, defenders of the treaty further contend that it incorporates an exhaustive procedural cover that gives protections substantially similar to the US Constitution. Reeves (2000) concludes that the Rome Statute does not deprive US citizens of the rights encapsulated in the American Constitution, neither does it violate the American constitutional perception of due process.

2.5. The Rome Statute and its Advancement US Aspirations

It is hard to properly unearth a genuine reason for the US non-ratification of the ICC treaty, even though it encompasses the US ideals and perception of justice. Historically, the US has occupied the enviable status of leader of the free world and champion for human rights, freedoms and justice. The Court is independent and designed to uphold the highest standard of justice (Human Rights Watch, 2019). As a result, the treaty recognises rights such as presumption of innocence; right to counsel; right to present evidence and to confront witnesses; right to remain silent; right to be present at trial; right to have charges proved beyond a reasonable doubt; right to an appeal and protection against double jeopardy (Human Rights Watch, 2019).

Several US goals were accomplished during the discussions and incorporated into the Rome Statute (Brown, 1999). According to the Carr Centre for Human Rights working paper, the Rome Statute, in its final form, promises to advance US interests in three important ways.⁴⁷ In the first place, the ICC will serve as a disincentive to potential perpetrators of serious crimes. The likelihood of being prosecuted will be a restraining factor for their actions. Secondly, since it launched the war on terror in 2001, the US has been quite concerned about its national security as well as international peace, stability, and security. With an institution like the ICC, justice and accountability for perpetrators of international crimes can be guaranteed. Thus US support for the ICC will enhance its national interest and that of the international community. Thirdly, support for the ICC in order to actualize its objectives will strengthen international law and ensure its efficacy. The relevance of international law to international peace, security, stability and justice cannot be overemphasized. The US has on numerous occasions cited international law and its violation as the basis or justification for its actions.

2.6. Alleged Crimes by US Personnel and ICC's Request for Investigation

The rift between US and ICC is traceable to the 11 September, 2001 attack on the US, which was said to have been launched from Afghanistan (Thompson and Manson, 2017). Erstwhile US President, George W. Bush, consequently declared an international "War on Terror" (Moeller, 2004). When the Taliban-led government declined to surrender Osama Bin Laden, alleged mastermind of the attack, President Bush sent American troops to Afghanistan to engage al Qaeda and the Taliban forces. On 7 October, 2001, the US and Britain carried out airstrikes on Taliban and al Qaeda targets, which marked the beginning of a protracted conflict, characterized by gross human rights violations by all sides.

The protagonists in the conflict in Afghanistan have been involved in gross violation of human rights and international humanitarian law. These include the Taliban and allied violent groups such as the Haqqani network, Afghan armed forces and militias affiliated to them, and foreign forces led by the US (Thompson and Manson, 2017). ICC prosecutor said crimes perpetrated by US personnel included "the use sexual violence, severe isolation, suffocation by water or waterboarding, hooding under special conditions, threats of torture and the use of dogs to induce fear" (Thompson and Manson, 2017).

On the part of the Taliban and its associates, the prosecutor said they "deliberately killed civilians perceived to support the Afghan government and/or civilians perceived to support foreign entities, or civilians perceived to oppose Taliban rule and ideology" (Thompson and Manson, 2017). The Afghan government forces are alleged to have carried out widespread torture in their detention facilities (Thompson and Manson, 2017).

Reacting to the prosecutor's statement, a Pentagon spokesman stated that the US respects the law of war and is profoundly dedicated to it. The US also has in place a vigorous domestic mechanism that addresses issues of investigation and responsibility that are consistent with global standards (Thompson and Manson, 2017). The envisioned investigation was described as unwarranted and inappropriate. The remarks credited to the Pentagon are paradoxical as American personnel implicated in the abuses in Afghanistan were never prosecuted in US national courts even though the authorities opened an inquiry into alleged crimes committed by them.

(Human Rights Watch, 2019), noted that the department of justice launched an inquiry into more than 100 cases relating to abuse of detainees in 2009. However, nobody was charged. The US authorities clearly swept the heinous crimes committed by their personnel under the carpet and defied global outrage and call for their prosecution. Back home these individuals were seen as heroes rather than villains. It is in view of the failure of the US authorities to act that the prosecutor proposed the investigation. According to the prosecutor an investigation was necessary in view of the seriousness of the violations by the US forces and the failure to institute domestic criminal charges against those most culpable (Thompson and Manson, 2017).

In November, 2017, Fatou Bensouda, ICC chief prosecutor sought approval to inquire into war crimes by all sides in the conflict in Afghanistan, among them US forces, CIA, the Taliban and Afghan government forces. In an earlier report in 2016, Bensouda had highlighted the impact of armed conflict on the people of Afghanistan (Rasmussen and Bowcott, 2017). Military personnel of the US tortured detainees in a manner that amounted to war crimes between 2003 and 2014 and beyond. In 2017, Bensouda submitted a request to judges of the ICC for approval to launch an inquiry into war crimes and crimes against humanity, like murder, attacks on aid workers, use of child soldiers and extra judicial executions.

The Prosecution devoted a specific section of the request to the policies allegedly pursued by US military personnel with regard to the interrogation of detainees. The Request contained information to the effect that several individuals were captured, detained and transferred by US armed forces to specific US-controlled facilities on the basis of suspicions either of being members or cooperators of Al-Qaeda, the Taliban or other associated armed groups; or of having knowledge of operations and planned offensives. The prosecutor noted that there existed reasonable grounds to infer that American personnel perpetrated war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence in furtherance of a policy endorsed by the American government. The Prosecution mainly relied on the findings of the US Senate Select Committee on Intelligence, the US Senate Armed Services Committee and the US Department of Defence. The prosecutor noted that as a result of a scrupulous precursory inquiry carried out by her office, it had been concluded that the requirements for the commencement of investigation had been fulfilled (Rasmussen and Bowcott, 2017). The request would then be considered by judges of the pre-trial chamber.

2.7. US Reject ICC's Moves: Threaten Sanctions

The action initiated by ICC chief prosecutor did not go down well with the United States. Its National Security Adviser (NSA), John Bolton, issued threats of sanctions on the ICC if the court embarked on the investigation of crimes perpetrated by its servicemen in Afghanistan. In September, 2018, Bolton remarked that the US was up to the task of protecting its citizens and those of its friends from partisan prosecution by an illegitimate court and will adopt any measures to do so. Owen *et al.* (2018). Bolton stated further that the court's move was a threat to "American sovereignty and us national security" (BBC, 2018). Another complaint by Bolton was the absence of checks and balances and the court's subordination to the US Constitution. He said the US will neither cooperate nor assist the court and that they "will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us" (BBC, 2018). The US stance was reinforced by President Donald Trump when he made a speech at the UN General Assembly in September, 2018. He remarked that the US will not assist or endorse the ICC due to its lack of jurisdiction, legitimacy, and authority (Human Rights Watch, 2019). The US Secretary of State, Mike Pompeo reaffirmed the US government position on 4 December, 2018 (Human Rights Watch, 2019).

On 15 March, 2015, Mike Pompeo, declared that officials of the ICC would be barred from that country if they went ahead with the proposed inquiry into crimes perpetrated in Afghanistan. The visa embargo would prevent judges and prosecutors of the ICC from accessing the territory of United States. Funds in the US belonging to the Court may be sanctioned. Pompeo declared at a press conference that the government had approved a strategy to restrict US visa to persons involved in the ICC inquiry (Wroughton, 2019). The visa ban is also extended to protect allies of the US, including Israel, accused of war crimes. He warned further that the visa ban was one of the steps under consideration. Additional measures would include economic sanctions, unless the court was ready to abandon the action (Wroughton, 2019). In its response, the ICC reiterated the fact that it was an independent and impartial institution and would continue to carry out its mandate resolutely (Wroughton, 2019).

2.8. From Rhetoric to Action: US Revokes Entry Visa of ICC Prosecutor

The Secretary of State Pompeo said in March 2019 that the US would impose visa restriction on ICC officials for "attacking America's rule of law" (Bryant, 2019). On 5 April, 2019 US authorities demonstrated that they meant business and were not bluffing. In fulfillment of the threat to refuse visas to officials investigating war crimes by American forces in Afghanistan, the US rescinded the visa of the ICC chief prosecutor, Fatou Bensouda, disallowing her entry into the country (Bryant, 2019). In a statement issued from her office, Bensouda announced that she would carry on with her duties "without fear or favour" (Wintour and Bowcott, 2019). Justifying the visa ban, a State Department spokesperson said the US would do whatever was necessary to safeguard its sovereignty and citizens from unjustified probe and prosecution (Wintour and Bowcott, 2019).

2.9. ICC Capitulates: Judges Reject Prosecutor's Request to Investigate War Crimes

In April 2019, judges in the Pre-trial Chamber of ICC officially turned down the request to inquire into war crimes submitted to it presented by the prosecutor in 2018. In their ruling, they blamed lack of cooperation from the US, the Taliban and Afghan government (Felter, 2019), adding that such probe and prosecution was unlikely to succeed. The judges, however, acknowledged that Bensouda's request proves the existence of a justifiable ground to conclude that crimes perpetrated in Afghanistan fell within the competence of the ICC "and that potential cases would be admissible before the court" (Bowcott, 2019). In relation to alleged maltreatment of detainees by US personnel, the Court ruled that there existed a justifiable ground to infer that US military personnel had perpetrated torture, cruel treatment, outrages upon personal dignity, rape and other types of sexual assault since May, 2003 and their conduct was approved by the US authorities (Bowcott, 2019).

3. Is International Criminal Justice on Trial?

3.1. Double Standard and Selective Accountability

The US has been accused of double standard on international criminality (Falk, 2012). While it advocates international criminal justice for others, it does not want its own citizens to face the ICC (Falk, 2012). Over the years, the US has vigorously called for the prosecution of war criminals elsewhere, and it is really chagrin to find out that it hypocritically refuses to let its own possible perpetrators be held to the same standard. The current tussle between the US and the ICC is both an attack on multilateral agreements and the general adherence to international law. And even though Pompeo tried to reaffirm the US' support for "international and hybrid mechanisms" his statement reeks of high-level hypocrisy. It only sends a narrative that the US will support international justice as long as those prosecuted are not its nationals.

3.2. The World Misses America's Leadership

The denial of visa by the US to personnel of the ICC, speaks of a targeted effort to frustrate the mission and objectives of the ICC. The US plays a very significant role in the attainment of global Justice because of its size, capacity and influence in the international community. Any move by the US that is not consistent with the fight for justice, accountability and rule of law inflicts a heavy blow on the ability of the ICC to effectively pursue international justice. The President of the ICC, Chile Eboe-Osuji, wondered why the US would contemplate such drastic action against officials of the court, including judges, who were only performing their duties in conformity with the law (Haddadin, 2018).

The non-participation of the US in the activities of the court keeps it on the sideline and denies it a voice when global issues of justice and accountability are discussed. As the Chile Eboe-Osuji recently observed, the ICC exists to make sure that millions of men, women and children no longer fall victim to mind-boggling barbarity; and that America's leadership and caring instincts for humanity are greatly missed at such a forum. In an interview with the *Voice of America*, Eboe-Osuji said "Lots of Americans support the court and wish us well. And the only thing now is for the government to also pay heed to the role America has played in this sort of endeavor in the past". The absence of the US at the ICC is therefore a great loss to the global community.

3.3. Shock and Dismay within the Human Rights Domain

The pressure and threats inflicted on officials of the court and its eventual capitulation provoked the human rights community. Human Rights Watch describes the ICC ruling abandoning the Afghan investigation as "a devastating blow for victims who have suffered graves crimes without redress" (Bowcott, 2019); and that it sends a troubling notice to transgressors that they can commit serious crimes and escape the wrath of the law "just by being uncooperative" (Bowcott, 2019). Andrea Prasow of Human Rights Watch said going after persons on the payroll of the ICC clears way for torturers and killers to assume that their crimes may go all the way unrestrained (Wroughton, 2019). Liz Evenson also of Human Rights Watch described the comments by Pompeo and Bolton as a flagrant endeavour to intimidate the Court and impede any perusal of its conduct (Bryant, 2019).

The American Civil Liberties Union declared the US conduct which led to the abandonment of the Afghan investigation as scandalous and incomprehensible. It wondered why persons preyed upon and who suffered greatly in situations of armed conflict could not be optimistic of getting justice for heinous crimes that had been well chronicled. The group blamed the Trump administration for trying to frustrate the ICC investigation before it even kicked off. It accused the US of bullying the court in order to escape responsibility but noted that "but the administration is playing a dangerous game that will inevitably come back to haunt the United States" (Bowcott, 2019). The Union observed that the main beneficiaries of an ineffective ICC are dictators "when we weaken and sabotage international institutions established to fight impunity and hold human rights abusers accountable" (Bowcott, 2019). Another human rights group, Reprieve, described the ICC's decision to abandon the Afghan investigation as "a grave disappointment for survivors of war-on-terror era torture who have waited nearly two decades for justice" (Bowcott, 2019).

3.4. Unassailable Escape Route for Culprits

The ICC is created to prosecute the most horrendous crimes of serious concern to the international community. The appalling crimes under investigation in Afghanistan were also perpetrated by groups other than American officials. These include a terrorist group known as Taliban and its allies and the Armed Forces of Afghanistan.

Thus, by preventing or obstructing an inquiry into awful crimes committed in that country, just to protect its citizens, the US is also promoting impunity for crimes by the Taliban (Trahan, 2019).

The idea of insisting that US personnel are “above the law” is very alarming and unsatisfactory and does not serve US interests. Their defiance may also create a dangerous precedent for other states that may want to shield their nationals from justice and accountability. Russia withdrew its signature from the Rome Statute on 16 November, 2016 (bylaw No 361-rp). This was intended to prevent ICC scrutiny of its military activities in Crimea and Sevastopol (Sayapin, 2016). Burundi a member of the ICC renounced its membership on 27 October, 2017, when the prosecutor signaled an intention to investigate human rights abuses being perpetrated by government forces. The government accused the Court of targeting Africans (BBC, 2018). In 2019, the President of the Philippine, Rodrigo Duterte, disengaged his country from the ICC “after the court launched an inquiry into his government’s war on drugs, saying domestic courts are sufficient to enforce the rule of law” (Felter, 2019).

The ICC does not oust the jurisdiction of national courts, but complement them. States still retain the primary responsibility to prosecute violators. The sad reality remains that the response of the US to the allegations made against its personnel is one that seeks to entirely insulate its officials from consequences. But then, this attempted insulation has also covered other big perpetrators and aggressors in the Afghan situation. This puts the future of international criminal justice in jeopardy. The fundamental problem according to Kahn (2003) is that “the jurisdiction of the Court has become the site for a symbolic battle between law and politics.” And for the US, the nation believes that politics has priority over law (Kahn, 2003).

The big issue that may be raised in the ICC-US standoff and the seeming victory of the latter relates to the prospect of international criminal justice itself. In his reaction to the warning issued to the ICC by John Bolton, a former US Ambassador-at-Large for War Crimes Issues, David Scheffer, was dismayed with the Bolton speech, which he said detached the US from international criminal justice and painfully weakens the primacy the country holds in ensuring that war criminals everywhere face justice. He said that the US stance depicted double standard, which would greatly please totalitarian administrations. The consequence being that these dictators “will resist accountability for atrocity crimes and ignore international efforts to advance the rule of law” (Bryant, 2019). Scheffer concluded that the speech was “soaked in fear and Bolton sounded the message, once again, that the United States is intimidated by international law and multilateral organizations. I saw not strength but weakness conveyed today by the Trump Administration” (Bryant, 2019).

4. Conclusion

The United Nations, many human rights organizations, and most democratic nations have expressed support for the ICC. Considering the acclaimed stance of the US to be the global leader and an apostle of human rights, it is supposed to be an integral part of the ICC and not an opposition to its activities. The decision of the US to alienate itself from the ICC is a dishonor to a country that is acclaimed advocate of human rights, accountability and rule of law. Furthermore, the decision of the US to deny officials of the ICC entry into its territory of the US undermines the credibility of the mantra the country is historically renowned for and the ideals it claims to pilot.

The US must desist from moves that question its stance on global justice and ensure it does not undermine efforts by the international community to check, punish perpetrators and provide closure for victims of horrendous and heinous crimes and other grave atrocities that have been committed in the past. Selective justice is abhorrent in every sense. A world where crimes by some groups of individuals are overlooked because they are American citizens is undesirable, and the US must be held to their proclaimed standards. Should the UN and the international community in general bend to the whims and caprices of the US in its venture to insulate itself and its citizens from international judicial process, then international criminal justice is on a serious trial. Such request for selective justice is a shame and the claim of the US to support global justice becomes a disgraceful pretense.

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