

NO CLARITY: THE TRUMP ADMINISTRATION'S FIRST FIVE MONTHS & THE ICC

It is hard to avoid speculation when it comes to how the Trump administration will approach the International Criminal Court (ICC). This is partly because the Trump administration has not released a clear statement about its position on the US-ICC relationship. After 5 months under the Trump administration, there has not been a notable change in US activities related to engagement with the ICC. In fact, the US statements at the UN have remained supportive. Although there is cause for concern about the future, particularly with the Office of the Prosecutor (OTP) looking at Rome Statute crimes committed, in Afghanistan and in Palestine. Additional facts including the administrations' general attitude towards international organizations or the policy on the State Department's website can also give indications about a possible Trump position or the absence of a position. The lack of clarity from the Trump administration and the indicators that this paper considers does not equate to an immediate threat of hostile US-ICC relations.

I. Positive Statements

The most hopeful clues about future US-ICC relations came in the form of statements from the US Deputy Legal Advisor, Stephen Townley, at a UN Security Council meeting, the US Embassy in Khartoum in Sudan, and Ambassador Michele Sison, the US Deputy Permanent Representative at the Security Council. Yet, even logical deductions from those statements cannot be turned into predictions about the future position of the Trump administration on the ICC.

a) US Mission's Statements to the Security Council after the ICC Prosecutor's briefings

On May 8th, Stephen Townley delivered the first official US statement, under the Trump Administration, to involve the ICC. The United States' statement at the Security Council praised the ICC Prosecutor Fatou Bensouda's work on the Libya situation, and, implored states to extradite individuals under ICC arrest warrants to The Hague for trial.

"We urge all relevant Libyan actors to facilitate the transfer of Saif Qadhafi to The Hague so he may stand trial for his alleged crimes against humanity. We welcome the continued reports of Libya's cooperation with the Prosecutor, consistent with this Council's calls for such cooperation and Libya's obligations under resolution 1970."

The United States also expressed support for accountability of those responsible for crimes in Libya. It did so because the United States recognizes the necessity of accountability and justice to secure peace and stability. This was a powerful and commendable statement by the United States.

One month later, on June 8th, 2017, Ambassador Michele J. Sison, the US deputy permanent representative to the United Nations spoke on behalf of the US delegation. She stated:

“Having referred the situation in Darfur to the ICC over ten years ago, we must continue to demand Sudan’s compliance with this Council’s decisions. While victims have not yet seen justice, and refugees and internally displaced persons continue to struggle years after the conflict began, it is unacceptable that President Bashir still travels and receives a warm welcome from certain quarters of the world– and unacceptable that none of the Sudanese officials with outstanding arrest warrants have been brought to justice.”

Admittedly, the first statement could have been an anomaly. However, the similarity of the two statements and the fact that the Deputy Permanent Representative of the US Mission to the UN delivered the second statement, suggest that these statements have some weight. Furthermore, the fact that the statements were delivered at the UN Security Council, which is arguably the most scrutinized diplomatic forum, makes the pro-ICC nature of these statements even more encouraging.

In the best-case scenario, the statements could indicate that the Trump administration’s policy on the ICC will follow the Obama administration policy or the policy of the second half of the Bush administration. That policy was to support the Court in cases where it was in US national interests to do so. Although, it is encouraging that the UN mission was consistent with past policy, the Security Council Statement could have resulted from a variety of situations. It is also possible that the statement about Libya originated from the UN mission, and might not represent thinking in Washington. It could mean that no new policy has formed. If the Trump administration does plan to follow the policy, it should continue to show a strong push for international criminal justice in situations where it fits US national interests, such as in Libya or Darfur.

While some might argue, that the statements’ significance is questionable given that Ambassador Nikki Haley did not deliver either statement herself. It should be noted Ambassador Haley was at the Ocean’s conference during the June 8th meeting, and on May 8th she had just finished a month as the Security Council president. Plus, many of the preceding administrations’ pro-ICC statements were not delivered by the top-level officials, but the statements still demonstrated a

stronger US-ICC relationship than the one in the early 2000's. A statement from Nikki Haley at one of the future briefings from the prosecutor would be a clearer message of US support for the Court's work. However, many of Nikki Haley's actions receive substantial press coverage, so her statement could catch the eyes of those in Washington. This could become problematic if the US mission has been following the preceding administration's policy because of Trump administration's lack of attention towards the relationship.

b) US Embassy in Khartoum to the Security Council after the ICC Prosecutor's briefing on the Libya Situation

So far, the biggest test of the US-ICC relationship under the Trump Administration came in the form of reports that both US President Donald Trump and Sudanese President Omar al-Bashir would be attending the Islamic-American Summit. The ICC issued an arrest warrant for Bashir for charges of genocide, crimes against humanity and war crimes. Fortunately, for the administration, it was announced that Bashir would no longer be attending the meeting on Friday, May 19th. The preceding Wednesday, May 17th, the US Embassy in Khartoum, Sudan had stated:

"We oppose invitations, facilitation, or support for travel by any person subject to outstanding International Criminal Court (ICC) arrest warrants, including President Bashir."

The statement not only referred to Bashir but stated US position towards "any person subject to... ICC arrest warrants." It was a strong statement in support of upholding the ICC arrest warrants and the travel of Bashir, which has been a continuous problem for the Court. However, like the Security Council statement, the Embassy statement may have been derived from a wider State Department agenda, or it may have merely originated from inside the Embassy. It may have reflected a variety of situations in Washington.

Furthermore, given the existing global press attention and the potential image problem, if Trump had attended the summit with Bashir, it would have been a stronger demonstration of US commitment to accountability if a statement came directly from Washington. During the previous two administrations, high-level officials gave numerous statements of US support for the Court's efforts in Darfur and called for the transfer of Bashir to The Hague after the Court issued an arrest warrant for him. It is more important than ever that the United States show a commitment to accountability in Darfur, and demonstrate that the United States does not condone impunity for those who committed atrocities. It should encourage its allies to work with

the ICC to deliver those under ICC arrest warrant to The Hague instead of enabling those individuals to travel to their country with impunity.

c) Speculation about Bannon's Remarks

In April news articles reported that the Trump Administration endorsed the ICC; speculation over future Trump policy towards the Court ensued. Yet, the potential “endorsement” was only a convoluted interpretation of a response by Sean Spicer at the White House Press Briefing on April 10, 2017. Yet, this speculation over Trump’s future approach to the ICC came at a time when few indicators exist.

“Q: Thank you, Sean. President Trump has spoken out extensively about the crimes of Bashar al-Assad in Syria. Does the President consider Assad a war criminal? And does he believe Assad should eventually appear before the ICC?”

“MR. SPICER: I think right now the focus is twofold. One is defeating ISIS, and the second is creating the political environment necessary for the Syrian people to have new leadership there. I don't think that there's -- I can't imagine a stable and peaceful Syria where Bashar al-Assad is in power. I think we all recognize that that happens -- and there can be a multipronged approach; we are ensuring that ISIS is contained and that there's a de-escalation of the proliferation of chemical weapons, at the same time, creating the environment for a change of leadership.

“Q Does the President believe Assad has committed a war crime?”

“MR. SPICER: I think that there is a court that decides those things. And obviously, there's a reason that -- well, I clearly -- the actions -- when you take an action against the people that he has, and I think we feel unbelievably confident in the intelligence that we have. But again, that would be something for a court to decide.”

The remarks revealed little evidence of a Trump policy towards the ICC. At first, when asked about whether Trump thought that Assad should go to the ICC, Spicer said nothing about the ICC—neither indicating favor nor opposition. When asked, whether the President thought Assad committed a war crime, Sean Spicer, responded: “I think there is a court that decides those things.” The speculation of whether Spicer indicated endorsement from the administration results from the remark “that would be something for a court to decide.” However, Spicer did not directly address the ICC in his response; when speaking, he refers to “a court,” not a specific

court like the ICC. He may not want to discuss the ICC directly, or he may not know or understand what the ICC is. Spicer may not know the Trump administration's attitudes on the ICC because the administration has not yet formulated an approach or has not prioritized the Court.

While the remark is unlikely to mean endorsement of the Court, the remark does reveal that, at least to Spicer's knowledge, the ICC has not received significant internal attention from the administration. The Office of the Press Secretary is not gearing up to deliver messages about the ICC. No impending action is ready. If they were getting ready to act against the ICC, it would be ill-advised for Spicer to say, "that would be something for a court to decide."

d) Statements: not predictive tools

Admittedly, there is only so much that can be derived from US statements at the UN or a US embassy. None of the statements came directly from Washington, and US officials' statements on foreign policy issues have been lacking consistency—even at the highest levels. For example, recently Donald Trump and Rex Tillerson made news for making opposing statements about the diplomatic crisis between Qatar and other Middle Eastern countries. So, it is difficult to ascertain if the sentiments and policies set forth by these statements will reflect future actions and positions of the US government.

However, it is encouraging that, during the Trump administration, the three official US statements on the ICC were supportive of the Court. Even if the statements were not directly delivered by Washington, pro-ICC statements from the US mission at the UN Security Council and from a US embassy is better than a hostile reaction to the Court.

The statements were consistent with the policy of constructive engagement, which was adopted under the Obama administration. Since no new policy has been publicly announced under the Trump administration, US officials may simply be following the old policy. Or, the supportive statements could be an intentional decision by the administration because changing the US policy on the ICC is not a top priority of the administration or because it felt that the policy was compatible with their goals. It is also possible that the administration simply has not paid attention to the ICC yet, and these offices are just echoing preceding statements and acting outside of Washington's radar. So, it is likely, that the administration either does not yet care about the ICC policy or the administration is at least neutral or in favor of the preceding policy. In either case, there is a chance that the US policy on the ICC will not change for some time.

II. Afghanistan & Palestine Cases

Future US attitudes towards the Court will likely shift if ICC judges authorize the prosecutor to investigate the situation in Afghanistan or the situation in Palestine. The preliminary examination of the situation in Afghanistan has led the OTP to find a reasonable basis to believe that US nationals were responsible for war crimes related to the torture of detainees in Afghanistan, Poland, Lithuania and Romania. If an investigation is opened against United States military or intelligence officials, this would be the first instance of the Court pursuing American nationals. The preliminary examination into the Palestine situation has been contested by the US because it rejects Palestine's eligibility to be a state party given the question of statehood, and, as Israel's closest ally, it opposes prosecution of Israeli nationals at the ICC. If the prosecutor would like an investigation on the ground she would need to request authorization from the pre-trial chamber. This public hearing could garner attention of the ICC from the Trump administration.

If the situations of Afghanistan and Palestine move beyond preliminary examination at the ICC, Trump may respond with hostility. The reaction might be particularly violent if the Court issued arrest warrants for US nationals for crimes committed in Afghanistan. The Trump administration might respond violently to an investigation or arrest warrant for an American, but it might be incorrect to assume this would inevitably harm the Court. An investigation or an arrest warrant would likely produce increased support from the international community and civil society, and, a defensive reaction from the international community would likely emerge in response to a violent response from the Trump administration.

On the other hand, if the US exercise a genuine investigation and prosecution of the US nationals responsible, cases against these US nationals would be inadmissible at the ICC. The Afghanistan situation could demonstrate how the principle of complementarity works and calm some of the fears about the Court. Yet, domestic prosecution is not likely to occur. No momentum for accountability for these crimes has begun, many of those responsible are covered under an amnesty instated during the Obama Administration, and President Trump has stated that he does not have a problem with torture. Plus, his ideology of American exceptionalism, and his past remarks about not having a problem with war crimes, imply that he would oppose prosecution of American Soldiers even at the local level.

III. Other indicators

a) Causes of Concern

Another cause of concern for how the Trump Administration will treat the ICC situation in Darfur can be found in the March 2017 US Bureau of African Affairs' fact-sheet on US-Sudan relations failed to mention the ICC, genocide, accountability or justice. The US has done very little on the issue of Darfur under the Trump Administration, and the fact sheet could reflect a potential shift away from the approach taken by Trump's predecessors. However, the fact sheet also does not mention any individuals who face arrest warrants from the ICC, and the ICC tries individuals, not states. Perhaps it could be reasoned that since the fact sheet was about the US relationship with Sudan, the state and not with its officials, it does not represent a shift in approach.

The Trump administration has asserted opposition to international organizations, which may be an indicator that the Trump administration will oppose the ICC, but it is unlikely that the Trump administration would oppose the existence of all international organizations. Numerous international organizations do essential work. For example, without US participation in international organizations, Americans would be unable to send mail internationally. Certain objectives can only be procured through international cooperation. The US mission at the UN has already recognized the importance of the ICC for securing accountability in Libya. The ICC's commitment to justice and accountability for atrocities is particularly attractive to the United States, and it serves an essential role in securing justice in many situations. The ICC is not like the international organizations which the Trump administration has repeatedly threatened to leave or defund. The US holds key leadership positions, is a major funder or has many obligations in these organizations. In comparison, the US is not a state party to the Rome Statute and does not fund the ICC. It has no obligations to the ICC aside from the Security Council-referred cases, but is interested in the Court's success.

In January, the New York Times reported that a provision in Trump's draft executive order titled, "Auditing and Reducing U.S. Funding of International Organizations," calls for a committee to consider cutting funds for the ICC. This provision would not mark a change in US practice because the US cannot fund the ICC. In fact, the American Service-Members Protection Act (ASPA) already bans US funding for the Court. However, its existence could hint at the administration's awareness of and attitudes towards the ICC. Some aspects of the adversarial nature of the administration's first action related to the Court might be a source of concern for future ICC-US relations. However, that is not yet clear. The provision may only imply that the US is not likely to begin allocating funds for the Court, or the administration may have wanted to

take a symbolic stance against increased cooperation with the ICC. The provision might have meant that the administration did not fully understand existing US law on the Court. Or, it may simply have been the result of a member of the administration seeing the ICC on a list of multi-lateral organizations. At the very least, the draft provision's existence means that a high-level member of the Trump administration is aware of the ICC. Fortunately, the provision of the draft executive order has yet to be signed by the president, and it would have no effect on US-ICC relations since it is already illegal under domestic law for the United States to fund the ICC.

b) Positive Signs

The State Department website presents another hint about the Trump administration's attitudes. The site states that the "current U.S. policy" is reflected through the May 2010 National Security Strategy.

"From Nuremberg to Yugoslavia to Liberia, the United States has seen that the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs. The United States is thus working to strengthen national justice systems and is maintaining our support for ad hoc international tribunals and hybrid courts. Those who intentionally target innocent civilians must be held accountable, and we will continue to support institutions and prosecutions that advance this important interest. Although the United States is not at present a party to the Rome Statute of the International Criminal Court, and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law."

It could be notable that this remained on the site after the administration has made many changes to the site—including the removal of pages and documents related to refugees and climate change. While the page's presence might be an indicator that the Trump administration will not differ significantly from the Obama administration in its policy on the ICC, it could merely be one of the results of an overwhelmed and unorganized State Department. Perhaps the Trump administration has not paid any attention to the ICC. Given that the National Security Strategy is State Department policy until it is replaced, it is likely that issuing a new policy on the ICC is not, currently, a top goal of the Trump administration.

Fortunately, it also seems the Trump administrations' core base is not against the Court as many neo-conservatives were at the start of the Bush administration. Nor, does Steve Bannon, Trump's

chief strategist and former editor of Breitbart, appear to have been particularly bothered by the Court. Bannon has turned some of Breitbart's views into Trump administration policy. Therefore, Breitbart is relevant in predicting the Trump administration's future attitudes towards the ICC. Inaccuracies about the Court are common on the Breitbart site. An article from January 25, 2015, falsely stated the ICC was in Switzerland. This could imply an attitude of ignorance towards the Court. In fact, under Bannon, Breitbart was not as aggressive towards the ICC as one might suspect. Breitbart articles have not been particularly supportive of the ICC, but they, also, did not engage in attacks against the ICC based on sovereignty or US vulnerability. It did not discuss US ratification of the Rome Statute. In an article about the conviction of Charles Taylor, Breitbart acknowledged that the victims were happy with the conviction. Nonetheless, the radical right-wing site has also written off international criminal justice as useless for procuring peace. An article on South African withdrawal from the Court stated: "no one could seriously believe that Adolf Hitler would have cancelled the Holocaust out of fear of being prosecuted by some court." Breitbart has also questioned ICC jurisdiction over Israelis in the Palestine situation, and it referred to potential future charges in the ICC against Netanyahu as "trumped-up charges." Therefore, the Trump administration might argue the ICC does not have jurisdiction over the Palestine situation. In other articles, Breitbart does not strongly condemn the Court's existence, nor does it analyze US engagement with the Court. This may translate to a Trump administration that ignores the Court, except when the Court impacts Israel or Afghanistan.

IV. Impact of Trump administration approach to the ICC

The worst-case scenario—a violent response to ICC arrest warrants or investigation in the Afghanistan or Palestine situation—will not sway the work of the prosecutor away from her mandate. The prosecutor has repeatedly stated that her mandate is to prosecute Rome Statute crimes without "fear or favor." Political pressure on the prosecutor to retract from an investigation would not be welcome and would probably be counter-productive.

While the US policy of constructive engagement with the ICC benefitted the Court's work and US national interests, the Court will not fall apart if the US withdraws from its previous policy. In its early years, the Court grew its influence and began work on situations such as Uganda and DRC despite a US policy to actively undermine the Courts' work and membership. Now, after 15 years of existence, 10 situations under investigation, 10 situations under preliminary examination, 3 complete convictions, 5 cases on appeal, 4 cases at the trial phase and 124 state parties to the Rome Statute, the Court is in a much better position than it was when it first began. It will be

better able to cope with a return of US hostility towards the Court if the Trump administration adopts such a policy. The ICC will exist and work to end impunity far into the future even if the Trump administration adopts a hostile policy towards the Court. As previously discussed, a sharp Trump reaction to the Court could even bolster support for the Court from other states; it could also hurt the United States' global standing.

One of the reasons the Bush administration shifted its ICC policy dramatically from its first to second term is that military officials found that the policy of hostile opposition was undermining the national interests of the United States. They also found that they had the same goals as the ICC—justice and accountability for atrocity crimes. It benefitted US national interests to support the ICC's work on a case-by-case basis. If the Trump administration decides to refuse cooperation and support for the ICC as a blanket policy, the US may once again self-sabotage its own national interests. The Trump administration should learn from past approaches and follow suit with its predecessor's progress towards accountability.

V. Key Points

- There is no clear indicator of the future Trump administration's policy on the ICC.
- Three official US statements during the Trump administration expressed support for Court's work. Yet, none of the statements came directly from Washington.
- The Trump administration response to the progression of the ICC's preliminary examinations of the situations in Afghanistan and Palestine may be hostile.
- If the United States genuinely investigates or prosecutes our own nationals responsible for war crimes in Afghanistan, ICC jurisdiction over the nationals would be inadmissible, and it could improve the US-ICC relationship.
- The draft executive order, that mentioned the ICC as an international organization that the US should consider defunding, has not yet come to fruition. It might not ever make any future progress.
- The Trump administrations' threats of withdrawing from international organizations does give some cause for concern about how it will approach the ICC, but the US is not a party to the ICC.
- There is no strong evidence of anti-ICC sentiment from Trump's base and from his administration.

- The 2010 National Security Strategy policy on the ICC is listed as the current policy on the State Department website.
- There are several scenarios which could explain the Trump administration's approach to the ICC or lack thereof:
 - The Trump administration is ignorant of the ICC.
 - The Trump administration is aware of the Court, but changing US policy on our relationship with the Court is not a priority for the Trump administration.
 - The Trump administration finds the policy of constructive engagement at least somewhat consistent with its agenda.
- The ICC will continue to work for the rule of law, justice and accountability regardless of whether the US supports the Court.
- The Trump administration should continue US cooperation with the ICC. Such support benefits US national interests and values.

VI. Conclusion

There is no reason yet to be immediately alarmed about the Trump administration's approach towards the ICC, or to be certain of an impending shift towards hostile US-ICC relations. For now, it seems that those in the US government are acting in accordance with the policy of constructive engagement, established under the Obama administration. Given recent statements, it might be assumed that the Trump administration is not gearing up for active hostility or a big announcement related to the ICC. So far, the Trump administration appears to be either ignorant, indifferent or perhaps even somewhat supportive of the ICC. So, unless events trigger a reaction from the administration, the US-ICC relationship will likely remain intact. However, given the Afghanistan and Palestine situation, there is reason to be concerned about how the Trump administration will react to investigations, summonses or arrest warrants of US nationals or Israelis. Yet, it is not certain when and how these situations will progress to investigations. So, for now, Americans should continue to advocate for US support of the ICC, applaud US statements in favor of the ICC's work and prepare for a potential reaction from the Trump administration if the Palestine or Afghanistan situation proceed.

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