

The U.S. finally sees the point of the International Criminal Court

The United States has undermined the ICC in the past. Now it has a chance to build the court's legitimacy.

By Oona Hathaway

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As more accounts of apparent Russian atrocities emerge from Ukraine, many American political leaders are developing a surprising new interest in the International Criminal Court, which was established in 2002 to try international crimes.

In early March, a Senate resolution sponsored by Sen. Lindsey O. Graham (R-S.C.) — and co-sponsored by members of both parties — spoke of the ICC with great respect, describing it as “an international tribunal that seeks to uphold the rule of law, especially in areas where no rule of law exists.” The resolution encouraged member states — the United States is not one — to petition the ICC to authorize any and all “investigations into war crimes and crimes against humanity committed by the Russian Armed Forces and their proxies and President Putin’s military commanders, at the direction of President Vladimir Putin.”

Reading this robust endorsement of the ICC’s role in enforcing international norms, it would be easy to forget that not long ago, the United States levied sanctions — usually reserved for those who violate international law rather than those who enforce it — on then-Chief Prosecutor Fatou Bensouda and other ICC personnel. President Donald Trump authorized the sanctions in June 2020, two months after the ICC’s appeals chamber authorized Bensouda to investigate the possibility that war crimes and crimes against humanity were committed by U.S., Afghan and Taliban forces in Afghanistan and at various CIA black sites in nations that were party to the ICC.

The sanctions made good on threats that Trump’s national security adviser John Bolton had made in 2018 in a speech before the Federalist Society, in which he argued that the ICC, by investigating U.S. actions in Afghanistan, “unacceptably threatens American sovereignty and U.S. national security interests.” The Biden administration lifted the sanctions in April 2021.

The United States in general, not just the Republican Party, has long had a fraught relationship with the ICC. Indeed, some elements of the Biden administration, notably the Pentagon, remain wary of engaging with it, even though President Biden himself has labeled Putin a “war criminal” and called for a “war crimes trial.” Nonetheless, this moment, when many nations around the world — and millions of their citizens — want to see Russia held accountable for its deplorable attacks on civilians, could offer the United States an opportunity to build a new relationship that could benefit it as well as the court.

The United States has been ambivalent about the ICC from the court's inception. When President Bill Clinton signed the Rome Statute (the treaty that created the ICC) in his final days in office, the administration expressed concern about "politicized" prosecutions and insisted that the court could have jurisdiction over U.S. personnel only after the Senate ratified the treaty — which would happen only if the ICC addressed Washington's concerns. President George W. Bush then promptly "unsigned" the treaty.

Congress not long after passed the American Service-Members' Protection Act — a law known to some of its critics as the "Hague Invasion Act," as it authorized the president to use "all means necessary and appropriate to bring about the release" of any U.S. or allied personnel "being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court." And it prohibited U.S. military aid to countries that joined the ICC unless they were members of NATO, were a major non-NATO ally or had agreed not to surrender U.S. personnel to the court. The United States then proceeded to pressure states that were parties to the Rome Statute to formally promise not to hand Americans over to the court.

A key argument the United States deployed against the ICC's investigation in Afghanistan — that the United States is not a party to the Rome Statute — is true of Russia as well. In both cases, ICC jurisdiction came about because the alleged crimes were committed on the territory of a state that had acceded to the jurisdiction of the court — Ukraine through special declarations in 2014 and 2015, shortly after Russia seized Crimea; and Afghanistan as a party to the Rome Statute. Ukraine's second declaration was not time-bound, so it opened the door to prosecutions of war crimes, crimes against humanity and genocide committed by either side in the current war.

Shortly after the war in Ukraine began in February, ICC Prosecutor Karim Khan announced that he was opening an investigation into the situation, given widespread allegations that the Russians were indiscriminately shelling civilian neighborhoods in Kharkiv and other cities. By late March, 41 state parties had submitted referrals supporting the investigation, allowing Khan to launch the probe immediately (that is, without first seeking the approval of the court's pretrial chamber). Meanwhile reports of atrocities have only grown: There was the bombing of a theater in Mariupol where hundreds of civilians were sheltering; evidence of torture, sexual assault, dismemberment and beheading of civilians in Bucha; and a missile strike on a train station in Kramatorsk that killed at least 50.

Is it hypocritical, under these circumstances, for the United States to embrace a court it has so aggressively rejected in the past? Perhaps so. But that doesn't change the fact that the United States is surely right to support accountability for the horrific crimes being committed in Ukraine. And the ICC is the institution best positioned to take up that charge. **Granted, it is not the only such institution: The Ukrainian prosecutor general is working to investigate thousands of possible war crimes, and Ukrainian President Volodymyr Zelensky just announced that he had approved the creation of a "special mechanism" in Ukraine to investigate Russian crimes. (What this means is not clear, but the goal appears to be to enable the joint work of national and international experts to support domestic prosecutions.)**

Those efforts for accountability should continue, but the Ukrainian courts sit in a war zone, which obviously threatens their ability to function. And prosecutions in domestic courts face challenges — including head-of-state immunity — that would be unlikely in an international court. Prosecutions in the domestic courts of other countries would encounter similar immunity issues. (Lithuania, Poland, Germany and other nations have begun domestic investigations of possible war crimes in Ukraine under statutes that provide for “universal jurisdiction” over such offenses.)

The question is how the United States might productively engage with the ICC. There is certainly little prospect that the United States will formally join the body. Nor is Washington likely to reverse its opposition to the court’s investigation of alleged U.S. crimes in Afghanistan and elsewhere. On top of that, an appropriations law from 1999 bars the United States from spending funds to support the court, and the American Service-Members Protection Act prohibits other institutional support, although, according to a 2010 memo by the Justice Department’s Office of Legal Counsel, the act allows for a number of exceptions.

Ideally those laws would be amended to allow for greater cooperation. But even if they aren’t, there is plenty of room for compromise that could benefit both sides in this complicated relationship.

The United States has demonstrated before and during this conflict that it has unparalleled intelligence regarding Russian military plans and activities. When he announced that the U.S. government had concluded that Russia’s forces had committed war crimes in Ukraine, Secretary of State Antony Blinken specifically said that the assessment was based partly on intelligence.

Sharing information with the ICC prosecutor as he investigates possible crimes in Ukraine could be an important step toward ensuring accountability. The 2010 Justice Department memo concluded that the United States could provide “intelligence, law enforcement information, diplomatic reporting, investigative actions, and testimony ... to the ICC for particular investigations or prosecutions of foreign nationals accused of genocide, war crimes, or crimes against humanity.”

In addition, the memo said, the United States could “detail personnel for an ICC investigation or prosecution of a foreign national” as long as the support was “case-specific” rather than institutional. The United States could also provide assistance and support to the Ukrainian government in evidence collection and handling — procedures that are crucial to prosecutions in any legal forum.

Providing such support to the Ukrainian government and the ICC would advance the cause of international justice. It would strengthen the court, which, after focusing most of its efforts on African countries and caving to U.S. threats by ending its investigation of the United States’ actions in Afghanistan, sorely needs to build its legitimacy. And it would help begin to repair the reputation of the United States, once a leading champion of international justice, as an advocate for international law and accountability for the most heinous crimes.

There is no getting around the charge of hypocrisy. To repair its image, the United States should, in future conflicts, be more transparent and aggressive about its own investigations into alleged crimes by its military personnel, making clear that it respects the ICC's values if not its jurisdictional authority. But supporting the ICC now would provide some measure of justice to the people of Ukraine, who continue to suffer in Russia's illegal war. That goal is more important than a foolish consistency.