

INTERNATIONAL CRIMINAL LAW

The Trump Administration Revokes the ICC Prosecutor's U.S. Visa Shortly Before the ICC Pre-Trial Chamber Declines to Authorize an Investigation into War Crimes in Afghanistan
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On April 4, 2019, the United States revoked the visa of Fatou Bensouda, the prosecutor of the International Criminal Court (ICC).¹ This action occurred less than a month after Secretary of State Mike Pompeo announced that, except to the extent otherwise required by the UN Headquarters Agreement, the United States would impose visa restrictions on “those individuals directly responsible for any ICC investigation of U.S. personnel.”² In her preliminary investigation into the situation in Afghanistan, Bensouda had specifically listed war crimes by U.S. military and intelligence agencies as one of several categories of crimes that her office found reason to believe had occurred.³ Approximately one week after Bensouda’s visa revocation, the ICC’s Pre-Trial Chamber (PTC) denied her request to move forward with an investigation of the situation in Afghanistan.⁴

The revocation of Bensouda’s visa built upon a “a continued effort to convince the ICC to change course” with respect to its consideration of U.S. war crimes in Afghanistan.⁵ In September 2018, National Security Advisor John Bolton delivered an address that not only challenged the validity of investigatory steps taken by the ICC in Afghanistan, but also called into question the legitimacy, jurisdiction, and authority of the ICC as an international institution.⁶ Bolton stated that “for all intents and purposes, the ICC is already dead to us.”⁷ He further warned that “[t]he United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court.”⁸ He specifically threatened a “ban [on ICC] judges and prosecutors . . . entering the United States.”⁹

¹ Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), at <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>; see also UN News, *Arrest of Three Libyans Wanted for Grave Crimes “Would Send Strong and Necessary Message” to Victims, Urges Top Prosecutor* (May 8, 2019), at <https://news.un.org/en/story/2019/05/1038171> [hereinafter UN News Story on Libya Briefing] (noting that the revocation occurred on April 4).

² U.S. Dep’t of State Press Briefing, *Remarks to the Press* (Mar. 15, 2019), at <https://www.state.gov/secretary/remarks/2019/03/290394.htm> [<https://perma.cc/8U82-HYCM>] [hereinafter *Remarks to the Press 2019*].

³ Int’l Crim. Ct., *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan* (Nov. 20, 2017), at <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>.

⁴ See generally *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Decision Pursuant to Article 15 of the Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019), available at https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF [hereinafter *Decision on the Situation in Afghanistan*].

⁵ See *Remarks to the Press 2019*, *supra* note 2.

⁶ John Bolton, National Security Advisor, *Protecting American Constitutionalism and Sovereignty from International Threats* (Sept. 10, 2018), available at <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court>; see also Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 131, 169, 169–73 (2019) (discussing Bolton’s speech and responses to it).

⁷ Bolton, *supra* note 6.

⁸ *Id.*

⁹ *Id.*

On March 15, 2019, Pompeo announced a policy of visa restrictions, citing to his authority under the Immigration and Nationality Act to place such restrictions on aliens “whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences.”¹⁰ He further remarked:

I’m announcing a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel. This includes persons who take or have taken action to request or further such an investigation. These visa restrictions may also be used to deter ICC efforts to pursue allied personnel, including Israelis, without allies’ consent. Implementation of this policy has already begun. Under U.S. law, individual visa records are confidential, so I will not provide details as to who has been affected and who will be affected.

But you should know if you’re responsible for the proposed ICC investigation of U.S. personnel in connection with the situation in Afghanistan, you should not assume that you will still have or will get a visa, or that you will be permitted to enter the United States. The United States will implement these measures consistent with applicable law, including our obligations under the United Nations Headquarters Agreement. These visa restrictions will not be the end of our efforts. We are prepared to take additional steps, including economic sanctions if the ICC does not change its course.

The first and highest obligation of our government is to protect its citizens and this administration will carry out that duty. America’s enduring commitment to the rule of law, accountability, and justice is the envy of the world, and it is the core—at the core of our country’s success. When U.S. service members fail to adhere to our strict code of military conduct, they are reprimanded, they’re court-martialed, and sentenced if that’s what’s deserved. The U.S. Government, where possible, takes legal action against those responsible for international crimes. The United States directs foreign aid to strengthen foreign nations’ domestic justice systems, the first and best line of defense against impunity.

The United States also supports international hybrid legal mechanisms when they operate effectively and are consistent with our national interest. These would include, for example, the mechanism handling Rwandan and Yugoslav atrocities and international evidence collection efforts in both Syria and Burma. But the ICC is attacking America’s rule of law. It’s not too late for the court to change course and we urge that it do so immediately.¹¹

While other countries, such as Sudan and Burundi, have prevented ICC officials from entering their countries to investigate war crimes and crimes against humanity,¹² the situation is further complicated here because the seat of the United Nations is located in New York City.¹³

¹⁰ Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(C)(i) (2012); *see also* Remarks to the Press 2019, *supra* note 2 (quoting language from 8 U.S.C. § 1182(a)(3)(C)(i) (2012)); *cf.* *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (holding that § 1182(f) of the Immigration and Nationality Act grants the president “broad discretion to suspend the entry of aliens into the United States” if the president finds it “would be detrimental to the national interest”).

¹¹ Remarks to the Press 2019, *supra* note 2.

¹² Simons & Specia, *supra* note 1.

¹³ Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, UN-U.S., June 26, 1947, 61 Stat. 756.

As such, the United States has agreed to uphold certain visitation rights for foreign nationals under the UN Headquarters Agreement. The U.S. government has an obligation to “not impose any impediments to transit to or from the headquarters district” by various persons, including those “invited to the head-quarters district by the United Nations or by [a] specialized agency on official business.”¹⁴ If visas are required to access the UN headquarters, Section 13(a) of the UN Headquarters Agreement states that “they shall be granted without charge and as promptly as possible.”¹⁵

The United States joined the UN Headquarters Agreement in 1947 through an executive agreement concluded by President Truman, which Congress had authorized by a joint resolution.¹⁶ Section 6 of the joint resolution included a provision that

[n]othing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the headquarters district and its immediate vicinity . . . and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries.¹⁷

The United Nations and the United States have a long-standing disagreement about the interpretation of this clause.¹⁸ The United Nation reads it as applicable to foreign nationals traveling into U.S. territory “*other than* the Headquarters District,”¹⁹ while the United States interprets it as applicable to foreign nationals traveling into U.S. territory generally.²⁰ The United States has further taken the position that “United Nations practice confirms that the host country is not expected to accept the entry of every individual to the Headquarters District, but must retain the right to exclude the entry of individuals in certain limited cases.”²¹

In announcing the ICC-related visa policy, Pompeo stated that the “United States will implement [the U.S. visa revocation policy] consistent with . . . our obligations under the United Nations Headquarters Agreement.”²² Although the ICC is not a UN agency, the prosecutor periodically travels to the United Nations to brief the Security Council on the situations in Libya and Sudan, both of which the Security Council has referred to the ICC

¹⁴ *Id.* Art. IV, § 11.

¹⁵ *Id.* Art. IV, § 13(a).

¹⁶ Pub. L. No. 80-357, 61 Stat. 756 (1947).

¹⁷ *Id.*, Annex 2, § 6.

¹⁸ A more detailed description of this disagreement—and of instances in which the United States has refused to provide accredited foreign nationals with access to the Headquarters District—can be found in Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 *AJIL* 516, 523–28 (2014).

¹⁹ *See, e.g.*, Memorandum by the Legal Department, Admission of Representatives of Non-governmental Organizations Enjoying Consultative Status, UN Doc. E/2397 (Apr. 10, 1953), available at <https://history.state.gov/historicaldocuments/frus1952-54v03/d82> (also arguing that “in the event that the provision in section 6 of the Joint Resolution had been intended by the United States to constitute a reservation, it was never made known to the General Assembly as such, and it was never considered by the General Assembly nor accepted by it”).

²⁰ *See, e.g.*, Letter from Donald B. Lourie, Under Secretary of State for Administration, to Henry Cabot Lodge Jr., Ambassador to the UN (May 1, 1953), available at <https://history.state.gov/historicaldocuments/frus1952-54v03/d89>.

²¹ Daugirdas & Mortenson, *supra* note 18, at 526 (quoting a 1988 State Department press release and noting that the United Nations legal counsel promptly contested this claim) (quotation marks omitted).

²² Remarks to the Press 2019, *supra* note 2.

for investigation.²³ Pompeo did not explicitly state how the United States would interpret the Headquarters Agreement with respect to Bensouda's presentations to the Security Council. The day after the revocation of Bensouda's visa, UN Spokesperson for the Secretary General Stéphane Dujarric made clear that "we expect the United States to live up to the agreement to allow for the travel of ICC staff members to do their work here at the United Nations."²⁴ Consistent with this expectation, the United States permitted Bensouda to enter the United States in May in order to brief the Security Council on the situation in Libya.²⁵

When the Office of the Prosecutor (OTP) confirmed the revocation of Bensouda's U.S. visa, the Associated Press reported that she stressed her "independent and impartial mandate" under the Rome Statute and commitment "to undertake that statutory duty with utmost commitment and professionalism, without fear or favor."²⁶ After the OTP's announcement, Human Rights Watch accused the United States of attempting "to bully the court and deter scrutiny of US conduct."²⁷ Expressing their views in more measured terms after Pompeo's announcement of the visa revocation policy, the foreign ministers of twenty-two countries in Europe and Latin America affirmed their support for the ICC and signaled "serious concern" over the policy and the "threat of additional measures" against ICC officials.²⁸

On April 12th, 2019—eight days after Bensouda's visa revocation—the PTC denied Bensouda's request to investigate war crimes and crimes against humanity committed in Afghanistan since May 2003 and additional war crimes "linked to the situation in Afghanistan" committed in other states after July 2002.²⁹ The PTC concluded that Bensouda's request satisfied the relevant requirements for "both jurisdiction and admissibility,"³⁰ finding that "there is a reasonable basis to believe" that crimes committed by U.S. military and intelligence agencies, the Taliban, and Afghan National Security Forces occurred in Afghanistan and other states in the relevant time period.³¹ Yet it rejected the request based on its assessment of the "interests of justice."³² The PTC expressed concern

²³ SC Res. 1970, paras. 4, 7 (2011) (referring the situation in Libya to the ICC and inviting the prosecutor to brief the Security Council at six month intervals on developments); SC Res. 1593, paras. 1, 8 (2005) (referring the situation in Darfur to the ICC and inviting the prosecutor to brief the Security Council at six month intervals on developments).

²⁴ UN Press Briefing, Daily Press Briefing by the Office of the Spokesperson for the Secretary-General (Apr. 5, 2019), at <https://www.un.org/press/en/2019/db190405.doc.htm>.

²⁵ UN News Story on Libya Briefing, *supra* note 1.

²⁶ Mike Corder, *US Revokes Visa for International Court Prosecutor Bensouda*, ASSOC. PRESS (Apr. 5, 2019), at <https://www.apnews.com/a5e0748b9b7443e683c6a0f4e0c7d509>. The U.S. State Department confirmed Bensouda's visa revocation due to her own public statement on the matter. *Id.*

²⁷ Human Rights Watch, *US Threatens International Criminal Court Visa Bans on ICC Staff* (Mar. 15, 2019), at <https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court>.

²⁸ Liechtenstein UN (@LiechtensteinUN), TWITTER (Mar. 29, 2019, 4:48 PM), at <https://twitter.com/LiechtensteinUN/status/1111777186418167815> [<https://perma.cc/RQZ7-RFWG>].

²⁹ See Decision on the Situation in Afghanistan, *supra* note 4, paras. 5, 20.

³⁰ *Id.*, para. 96.

³¹ *Id.*, paras. 47–48.

³² *Id.*, paras. 87–96. The Rome Statute provides that, in deciding whether to initiate an investigation, the prosecutor should consider whether or not an investigation would "serve the interests of justice." Rome Statute of the International Criminal Court, Art. 53(1)(c), 2(c), July 1, 2002, 2187 UNTS 90 [hereinafter Rome Statute]. It also provides that, where the prosecutor decides to initiate an investigation, the PTC is to "authorize the commencement of the investigation" if it "considers that there is a reasonable basis to proceed with an investigation." *Id.* Art. 15(4). Although the Rome Statute nowhere explicitly instructs the PTC to assess "the interests of justice," the PTC

over (1) the “availability of evidence for crimes dating back so long in time”; (2) the prospect of attaining meaningful cooperation from relevant actors; and (3) the “significant amount of resources” necessary to fund this sort of investigation considering the ICC’s budget.³³ With respect to the second factor, the PTC stated:

[C]hanges within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present conjuncture gives any reason to believe such cooperation can be taken for granted. Indeed, the Prosecution acknowledges the difficulties in securing albeit minimal cooperation from the relevant authorities as one of the reasons explaining the unusual duration of the preliminary examination. The Chamber has noted the Prosecution’s submissions to the effect that even neutral, low-impact activities proved unfeasible. Accordingly, it seems reasonable to assume that these difficulties will prove even trickier in the context of an investigation proper.³⁴

In light these factors, the PTC ultimately determined that this investigation would have limited success and “result in creating frustration and possibly hostility vis-à-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.”³⁵

Bensouda initially responded to the PTC’s decision by committing to “further analyse the decision and its implications, and consider all available legal remedies.”³⁶ Article 15(5) of the Rome Statute affords the prosecutor an opportunity to bring another request on the same situation if there are “new facts or evidence.”³⁷ With respect to appeal of the PTC decision, however, Bensouda’s prospects remain unclear.³⁸ The Rome Statute enumerates a limited list of decisions that “[e]ither party may appeal.”³⁹ Of those listed, none refer to a decision based on the “interests of justice.”⁴⁰ One provision states that “[a] decision with respect to

considered that, as “a statutory legal parameter governing the exercise of the prosecutorial discretion,” this criterion therefore “also [fell] within the scope of the scrutiny mandated to [the PTC] over that discretion for the purposes of the determinations under article 15.” Decision on the Situation in Afghanistan, *supra* note 4, para. 88.

³³ Decision on the Situation in Afghanistan, *supra* note 4, paras. 93–95.

³⁴ *Id.*, para. 94.

³⁵ *Id.*, para. 96.

³⁶ Int’l Crim. Ct., Statement of the Office of the Prosecutor Following the Decision of Pre-Trial Chamber II Concerning the Situation in Afghanistan (Apr. 5, 2019), at <https://www.icc-cpi.int/Pages/item.aspx?name=190412-otp-stat-afghanistan>.

³⁷ Rome Statute, *supra* note 32, Art. 15(5).

³⁸ See Kevin Jon Heller, *Can the PTC’s Afghanistan Decision Be Appealed?*, OPINIO JURIS (Apr. 12, 2019), at <http://opiniojuris.org/2019/04/12/can-the-ptcs-afghanistan-decision-be-appealed> (discussing this issue and expressing doubt about the reviewability of the PTC’s decision).

³⁹ Rome Statute, *supra* note 32, Art. 82(1); see also Situation in the Democratic Republic of the Congo, ICC-01/04, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, para. 39 (July 13, 2006), available at https://www.icc-cpi.int/CourtRecords/CR2006_01806.PDF (stating that “[Article 82] defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers”).

⁴⁰ Rome Statute, *supra* note 32, Art. 82(1)(a)–(d). As mentioned in note 32, *supra*, the Rome Statute does not explicitly vest the PTC with the power to review the prosecutor’s decision regarding “the interest of justice,” so it is perhaps unsurprising that Article 82 is silent with respect to appealability on this ground.

jurisdiction or admissibility” is appealable⁴¹—but while the PTC did reach a decision with respect to jurisdiction and admissibility, its conclusion on these grounds was favorable to the prosecutor.⁴² Another provision allows for appeal where the decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and, for which, in the opinion of the Pre-Trial Chamber . . . an immediate resolution by the Appeals Chamber may materially advance the proceedings.”⁴³ On June 9, Bensouda invoked this provision and sought leave from the PTC to appeal its decision.⁴⁴

The PTC’s decision met with mixed reactions. Some observers expressed their shock over the PTC’s decision and their concern that U.S. treatment of the ICC could negatively impact multinational support for international law. The director of the American Civil Liberties Union’s Human Rights Program stated: “No one except the world’s most brutal regimes win when we weaken and sabotage international institutions established to fight impunity and hold the human rights abusers accountable.”⁴⁵ Other human rights practitioners have indicated that the PTC’s decision seemed to signal that powerful actors, who threaten the ICC and decline to cooperate in ICC investigations, can escape inquiry.⁴⁶ President Trump, on the other hand, lauded the ICC’s decision as “a major international victory, not only for [Americans], but for the rule of law.”⁴⁷ He reiterated that “[a]ny attempt to target American, Israeli, or allied personnel for prosecution will be met with a swift and vigorous response.”⁴⁸ Prime Minister Benjamin Netanyahu of Israel also praised the decision.⁴⁹

⁴¹ *Id.* Art. 82(1)(a).

⁴² Decision on the Situation in Afghanistan, *supra* note 4, para. 96.

⁴³ Rome Statute, *supra* note 32, Art. 82(1)(d).

⁴⁴ Situation in the Islamic Republic of Afghanistan, ICC-02/17, Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, at paras. 7, 37 (June 7, 2019), available at https://www.icc-cpi.int/CourtRecords/CR2019_03060.PDF (further noting that “notwithstanding the Prosecution’s reliance on article 82(1)(d) for purposes of this application, the [PTC’s] Decision is much more similar in character to a ‘final decision,’ where the benefits of appellate scrutiny are immediately apparent and widely accepted”).

⁴⁵ Am. Civ. Liberties Union, *ACLU Comment on ICC Decision Not To Investigate U.S. for War Crimes in Afghanistan* (Apr. 12, 2019), at <https://www.aclu.org/news/aclu-comment-icc-decision-not-investigate-us-war-crimes-afghanistan>.

⁴⁶ See, e.g., Gabor Rona, *More on What’s Wrong with the ICC’s Decision on Afghanistan*, OPINIO JURIS (Apr. 15, 2019), at <https://opiniojuris.org/2019/04/15/more-on-whats-wrong-with-the-iccs-decision-on-afghanistan> (observing that “the mere appearance of a potential link” between U.S. behavior and the PTC’s decision “will weigh heavily on the credibility of the ICC in the future”); Alex Whiting, *The ICC’s Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), at <https://www.just-security.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations> (acknowledging how the PTC’s decision communicates that the ICC “will often be unable to proceed against powerful states,” because it “can only succeed where it has international support”).

⁴⁷ Donald J. Trump, Statement on the International Criminal Court’s Decision Not to Authorize an Investigation into the Situation in Afghanistan, 2019 DAILY COMP. PRES. DOC. NO. 224 (Apr. 12).

⁴⁸ *Id.*

⁴⁹ See *Netanyahu Says ICC Decision Not to Probe US Troops Bodes Well for Israel*, TIMES ISRAEL (Apr. 14, 2019), at <https://www.timesofisrael.com/netanyahu-says-icc-decision-not-to-probe-us-troops-bodes-well-for-israel>.