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### The International Criminal Court Under Attack (with transcript)

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*Interviewer:* [Music playing] welcome to Case in Point, produced by the University of Pennsylvania Law School. I'm your host, Aston Lattimore. In this episode, we'll be talking with Bill Burke-White, Professor of Law and Director of Perry World House at Penn. We'll be discussing the International Criminal Court in light of recent news that US National Security Advisor John Bolton, labeled the institution illegitimate. Thanks for joining us Bill.

*Interviewee:* It's a pleasure to be with you.

*Interviewer:* Great to have you. So, the ICC has only existed since 2002, what led to its creation, and where did the US stand on the issue at the time?

*Interviewee:* Yeah, so the International Criminal Court which is - sits in The Hague in the Netherlands and it as a court that tries to bring to justice the perpetrators of the most grave crimes. Things Genocide and war crimes around the world.

And you're right, it was created in 2002 after a period where there were several of those intermediate courts like the Yugoslavia World Crimes Tribunal and the Rwanda Tribunal, where the International Community wanted to bring to justice perpetrators of the genocides in those two countries.

And coming out of that there was a need to do something at a global level. And the International Criminal Court was the attempt to create a court that could bring to jail essentially the worst of the worst in the world. And that's what the ICC is today.

*Interviewer:* And what's the US's relationship with the ICC?

*Interviewee:* Well, it's complicated, back when the ICC was created, Bill Clinton signed on to the Rome Statute the treaty that created the court. And President Clinton at the time said, "The court wasn't perfect, but he wanted the US to be engaged with it."

When Clinton left office, George Bush came into the presidency and he really wanted nothing to do with the court whatsoever. And over time the US position softened, we've never joined the court, but we've started to support it to sometimes provide evidence to the court when maybe our satellites had imagery that would be helpful.

And by the end of the Obama Administration we had a pretty good relationship, but the court never had jurisdiction, the power to

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prosecute Americans for crimes in the United States, because we never ratified the treaty. Donald Trump well, we're about to talk about John Bolton's view.

*Interviewer:* So, what precipitated John Bolton's comments was, that the ICC has recently announced that there is probe that might begin into war crimes allegedly committed by US soldier in Afghanistan. Since we've never signed on officially, how would they go about prosecuting US soldiers?

*Interviewee:* Right. So, the first thing to remember is the US is not a formal party to this court. But the court has the power to prosecute in two circumstances. One is where the crime is committed by a national - a citizen of one of the states that's party to the court. As an American, I can't be prosecuted because of my American Citizenship. But a French citizen, could be because the French have signed on to the treaty.

Secondly, based on where the crime occurs. So, I'm an American I go to France and I commit genocide in France? I can be prosecuted because I committed the crime on the territory of a country that is part of the court.

And that's exactly the circumstance here, Afghanistan has joined the International Criminal Court. And as a result, if an American commits a crime in Afghanistan, then the court could in theory prosecute. There is nothing earth shattering about this, right?

Just imagine if you're an American and you go to France, you have to comply with the laws in France. It's not like that gets you out of their court system. So, that's exactly what's happening here, Afghanistan has given the court authority to prosecute, and therefore American's could be prosecuted.

*Interviewer:* Does the United States have any recourse to prevent that kind of prosecution from taking place?

*Interviewee:* A huge amount of recourse, and this is what John Bolton really misses completely in the remarks we heard last week. This court is created to be a backstop. It's only allowed to step in where national governments fail to prosecute themselves. This court is a secondary, not a primary way of holding people accountable. The whole goal of international criminal justice, is to get national courts to prosecute themselves.

And as a result, there is a rule that says the court cannot prosecute, where a national government has investigated, or prosecuted the crime itself. So, all the United States, or any other country has to do, to stop the International Criminal Court in its tracks, is take a serious investigation of the alleged activities.

And if in that serious investigation, the US finds that they were war crimes by American citizens, then we have to prosecute them. But if we look and there was nothing done wrong, and we followed proper procedure the court cannot touch us.

*Interviewer:* So, it sounds like how we got here is that the United States has not so far done a full accounting of any war crimes that might or might not have occurred in Afghanistan?

*Interviewee:* Right. And there is - we need to make sure that we can show the world that we've done a very thorough accounting. I just want to point out one thing. The US has an incredible military justice system. The judge advocate general system is fantastic.

And generally, we do some of the best investigations of our own people of any country in the world. And so, really all we have to do is, trust our own military and make sure our military is doing their own investigations, and then the ICC has to stand away.

*Interviewer:* So, since the war in Afghanistan has been going on, roughly 17 years now.

*Interviewee:* Yeah, it's been a long time now.

*Interviewer:* Is the ICC doing this now because perhaps they feel we've been given long enough in the United States to look into this, and we're not going to? Or, what's driving this decision to do this now?

*Interviewee:* So, I think there is a couple of factors. One, is that the Afghanistan has now joined the court, and that joining is retrospective effect back to the 2002.

So, in other words, the activities that the US might have done in Afghanistan fall within now the scope of the court's authority - that's one.

Two, there are some countries - some countries that we may not be very friendly with that are pushing the court to look at the United States. And on some issues for example, the Palestinian government has tried to join the court and sort of made referrals to

the court, pointing to crimes that the United States might have committed.

And finally, right, you give countries a while to investigate themselves. And if it's been long enough, that starts to be a signal to the world, that, that country isn't going to do anymore prosecution.

Now this is exactly what we want the court to be doing. Imagine this wasn't for the United States, but for some country that really had committed war crimes. The idea that you could motivate their national government to prosecute their own citizens. The idea that you could get their national government to focus on strengthening their judiciary and really bringing, you know, claims, that's what we want national governments to do. We just get a little suspicious when the court starts to push on us.

*Interviewer:* Of course. Based on what John Bolton had to say about this, it sounds like the United States, is not going to pursue an investigation. Rather, he's talking about imposing sanctions on the ICC. What kind of sanctions could the United States possibly impose here?

*Interviewee:* Well right, this is John Bolton - and first we have to talk about who John Bolton is, right? John Bolton is the US National Security Advisor. He is famous for when was ambassador to the United Nations arguing that the United Nations would be more effective if we chopped off the top eight floors of the UN Headquarters building and got rid of the secretary general. This is a man who hates international institutions. This is a man who hates any external authority that tries to put pressure on the United States.

So, last week he comes out, and he makes this big speech. He calls the court illegitimate, he criticizes this investigation. That's all sort of par for the course, I'm not surprised given who John Bolton is. You asked what sort of sanctions could the, you know, could be imposed. Well the US under George Bush tried a variety of kinds of sanctions. I guess you can call them sanctions.

We passed a law at that point that said, that if an American was ever hauled before the International Criminal Court, the United States military would be ordered to invade the Netherlands and rescue that person. A little bit crazy.

We also, forced other governments to sign agreements with the United States, promising never to give an American Citizen over to

the court, and conditioning any military aide or foreign assistance money. Their promise to extradite - to send an American off to -to the court.

So, those sorts of things are certainly possible. Again, I suppose we can also put pressure on other governments that are giving money and resources, friends of ours, like the Canadians or the Germans, or the Brits are big supporters of this court. And we can certainly try to put pressure on them, and I think John Bolton will do so.

At the end of the day though, this is a lot of rhetoric, it's really an opportunity for Bolton to make some loud noise about an international institution that he and Donald Trump don't really like.

*Interviewer:* Do you think that the United States relationship with the ICC could potentially recover perhaps under an administration that was less hostile to international law?

*Interviewee:* You know, I worked on ICC issues at the state department when I worked for Secretary Clinton, when she was secretary of state. And during that year that was a kind of thaw in relations.

The prosecutor of the International Criminal Court would come visit us in Washington once or twice a year. We would get request for judicial cooperation, sometimes again I mentioned satellite imagery or other technical information we could provide the court.

And I do think that kind of cooperation can recover. It's really based on a good relationship between the current administration and the court itself. And I could imagine that happening in a post Trump universe.

There is a broader question though, which is will the United States ever ratify the Rome Statue? We will ever formally join this court? Doing so would subject any American, wherever they commit war crimes, genocide, crimes against humanity to potentially be prosecuted at the court. I hope so, I don't think it's gonna happen anytime soon.

Some of us wanted Barack Obama to join. And you know, we had a liberal democratic president who believed in the international order, we still didn't. Largely because there were concerns not necessarily accurate, but concerns by the US military and others that the, you know, the United States has to play a big ole around the world and we didn't need to, or want to be policed by it.

Concerns that the court was still young, we needed to see it develop and see whether it would really end up as an independent impartial and effective institution.

My hope is, if you give it another 20 years - and this court has been working well, bringing to justice horrible people from around the world. Maybe at that point the United States will have the level of trust that would allow us to someday join the court.

*Interviewer:* Well this has been a fantastic discussion. Thank you very much for joining us Bill.

*Interviewee:* The pleasure has been mine.

*Interviewer:* And thank you for listening to Case in Point [*Music Playing*].

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