The Trump Effect Saves U.S. Soldiers From Runaway Prosecutors

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For an administration reputed to be diplomatically inept, the Trump foreign policy team scored a big victory in The Hague last Friday that will protect American soldiers from illegitimate and unaccountable foreign prosecutions.
The International Criminal Court dropped a more than decade-long inquiry into alleged crimes by U.S. personnel in Afghanistan. The action came soon after Secretary of State Mike Pompeo announced the U.S. would deny a visa to the court’s prosecutor, Fatou Bensouda, and potentially other court officials, because of their possible prosecution of Americans. The court said in an opinion that it wouldn’t proceed because of “changes within the relevant political landscape” suggesting it would not get “cooperation” from the U.S. In other words, the Trump Effect.
The U.S.—like most other non-European major military powers—never accepted the court’s jurisdiction. According to its own statute, the ICC can only prosecute when a country is “unwilling or unable” to prosecute its own war crimes. But the U.S. has no problem prosecuting its soldiers domestically in military courts if they violate the law.
If the ICC were to indict U.S. servicemen, no American president would turn them over, but it would have a real effect on their lives. They would face peril in traveling to countries that have joined the ICC, including all of Western Europe. They would be international fugitives.
The Bush and Obama administrations also opposed ICC prosecutions of U.S. nationals. But only the Trump administration took active steps to prevent an investigation or prosecution of Americans from happening. Mr. Pompeo declared that Ms. Bensouda could not travel to the U.S. and made clear that other court officials could be added to the list. While the U.S. has no obligation to grant a visa to ICC officials (and it will allow the prosecutor to travel here to attend the United Nations), the measure is seen as “not cricket” in the genteel world of international organizations.
President Trump, Mr. Pompeo and National Security Advisor John Bolton correctly understand that their primary duty is to protect American nationals, not prop up the reputation of an already-failing treaty organization of which the U.S. is not a member. At very low cost, they have rescued American troops who served in Afghanistan from living under a Damocles sword of Hague-based prosecution.
The court’s nixing of the Afghanistan investigation inadvertently confirms criticisms that Mr. Bolton and others have leveled at the institution. The court’s officials are unaccountable to nationals of non-member states like the U.S. Yet they might sit in judgment of decisions made by U.S. personnel in life-or-death situations, and second-guess the judgments of professional prosecutors in democratic countries that have chosen not to join the court. The irony that the court has succumbed to pressures as minor as a visa restriction is a rich one.
Observers are increasingly questioning the value of the ICC. It has only convicted four people for core crimes—that is, the mass atrocity crimes the court was designed to deal with—since opening its doors in 2002. Numerous high-profile cases have collapsed. Its former prosecutor, Luis Moreno Ocampo, has been plagued by scandal, and its current judges are suing for higher salaries. In the past two years, countries have begun quitting the court’s treaty, a step that has shaken the court’s ideology of historic inevitability the same way Brexit has rocked the European Union.
After all that, the court’s decision about Afghanistan has infuriated even its supporters. This makes it more likely that the prosecutor will go for a Hail Mary to rehabilitate the institution in the eyes of internationalists and the European states that provide most of its budget—by prosecuting Israelis. It is currently considering whether to open an investigation into whether Israel is committing war crimes by allowing Jews to live in the West Bank. It bases its claim to jurisdiction on the putative membership of the “State of Palestine.” Thus the ICC would be investigating a non-member state at the behest of a non-state member, for a supposed crime that no one in the history of international criminal law has been charged with.
The White House anticipated this possibility, and in a statement last Friday announced that such an investigation would be met with a “swift and vigorous response.”
This is all an example of the administration’s brand of benign nationalism: supporting the right of democratic, law-abiding states to govern themselves, rather than ceding sovereignty to unaccountable institutions in the name of a pleasant-sounding but dysfunctional ideology of globalism.