The Int’l Criminal Court’s Case against the United States in Afghanistan: How it happened and what the future holds

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What happens when a global criminal court takes on the world’s dominant military power? That was the question earlier this month when the International Criminal Court’s Prosecutor Fatou Bensouda took a decisive step toward direct confrontation with the U.S government.

The Prosecutor’s brief announcement that she would seek permission to launch a formal investigation into the situation in Afghanistan followed a series of annual reports making clear that this investigation will cover not just the Taliban and Afghan security forces, but also U.S. military and intelligence officers. This is a scenario that both ICC critics and supporters in the U.S. government have fretted about ever since the formation of the court. Yet the official Department of Defense reaction was distinctly muted. Pentagon spokesperson Eric Pahon’s statement to National Public Radio that an ICC investigation with respect to U.S. personnel would be “wholly unwarranted and unjustified” drew in tone and content from U.S. government talking points that have been used for years. Will the government shift to a more aggressive response once senior leadership turns its attention away from the President’s trip to Asia and has a chance to weigh in?

Maybe, but there is a better option.

A rollercoaster relationship

It is already clear that the Prosecutor’s decision is not one that the U.S. government will accept. Under federal statute, cooperation with the ICC in prosecuting U.S. personnel is prohibited. On the policy level, the current and past administrations have strenuously objected to foreign courts or international tribunals exercising jurisdiction over U.S. personnel, citing concerns about unfair treatment. No U.S. administration has supported becoming party to the ICC Rome Statute (the court’s constitutive document), and the Bush Administration was so concerned that the court would try to assert power over U.S. personnel that it went to extraordinary lengths to guard against that possibility. It sought immunity agreements from member States using foreign assistance as leverage. It blocked U.N. peacekeeping resolutions at the Security Council because they did not include ICC immunity clauses. It even worked with Congress to enact a law–still on the books–authorizing the United States to use military force to rescue U.S. persons from The Hague should one ever be detained by the court.

While some countries signed immunity agreements, others balked, and this intimidation campaign is remembered chiefly for alienating U.S. partners. It petered out, and over the course of the second Bush term and during the Obama Administration (where I advised White House leadership on ICC policy), the U.S. government moved toward a more pragmatic policy of working with the court where their objectives and interests coincided. The era of warming relations between the court and the U.S. government began in earnest during the Bush Administration, when Secretary of State Condoleezza Rice traveled to the United Nations to cast a vote helping to ensure that the situation in Darfur would be referred to the ICC. The Obama Administration voted for two further U.N. referrals. In recent years, the United States helped deliver ICC fugitives Bosco Ntaganda and Dominic Ongwen to The Hague. The U.S. Congress even got involved, with bipartisan legislation allowing the State Department to fund multi-million-dollar rewards for information helping to bring ICC fugitives to justice. Though the court has struggled to be effective (with only nine convictions in the course of 15 years), the United States treated it almost as a partner in efforts to deter and mitigate mass atrocities in places where the U.S. government lacked the capacity to do so on its own.

Yet it has been an open secret for years that a confrontation over Afghanistan might be coming that could upset the developing relationship. There were quiet hints even before 2013, when the Prosecutor’s office began using its annual report on the court’s pre-investigatory “preliminary examinations” to signal publicly its interest in actions by “international forces.” In the coming years, the reports became more precise, focusing first on allegations of detainee abuse by U.S. military officers during a brief window in 2003 and 2004, then expanding to include allegations against the CIA, which became more specific after the Senate published part of a report including horrific details of alleged torture and other abuse in the agency’s detention and interrogation program.

Why the off ramps didn’t work

As the prospect of confrontation grew more concrete, the U.S. government was not especially optimistic that it would be averted, but it did believe there were off ramps that the Prosecutor could appropriately take.

One such off ramp might have involved a determination that the scale of the U.S. government’s offenses did not meet the court’s “gravity” threshold for proceeding to investigation. This was a tricky issue for U.S. government officials. Many found unconscionable the stories of torture and other abuse that had emerged from the years following the September 11 attacks, and had no desire to defend them as less than “grave”. When it came to the assertion of ICC jurisdiction, however, some of the strongest champions for robust accountability argued that “the numbers of victims pale in comparison to those in the situations that have come before the international courts and tribunals.” In his excellent Just Security essay earlier this month, Alex Whiting suggests that this line of argument is off base. He writes that the Prosecutor couldn’t focus just on the number of U.S. victims because she needed to consider whether “all crimes alleged in the Afghanistan situation taken together meet the gravity threshold.” While this may now be the prevailing view, however, it was not clear—at least to the U.S. government lawyers working the issue at the time—that on its face the Rome Statute required this interpretation. (An illustration of the gulf between U.S. and academic perspectives on gravity, among other things, can be seen in this 2014 post by Ryan Vogel and this rebuttal by Kevin Jon Heller.)

Government officials also saw a second potential off ramp. Beyond the issue of gravity, U.S. officials hoped that the Prosecutor might find the combination of U.S. military justice mechanisms and the Department of Justice’s investigation of certain CIA activities, led by career prosecutor John Durham, sufficiently credible to allow the Prosecutor to exercise her discretion to step back and focus on other crimes committed in Afghanistan by local actors. This deference to national jurisdictions is known as “complementarity” in ICC circles.

The U.S. government made its views known to Bensouda’s team, but over time it became increasingly clear that multiple factors pulled in the other direction. The Prosecutor’s office was under enormous pressure to broaden the scope of its efforts substantially beyond the cluster of sub-Saharan countries that have been the primary focus of the court’s investigatory work to date. Human rights NGOs built a public case that the U.S. government had not adequately investigated allegations of torture and other abuse during the Bush Administration and lobbied for the ICC to step in as a vehicle for accountability if not also deterrence. Especially given the trend in expert opinion, accepting the U.S. view of gravity would have been seen by many of the court’s most vocal supporters (as well as its detractors) as an illegitimate nod to pragmatism. Moreover, ICC judges have in at least one prominent situation signaled that they prefer to see the Prosecutor err on the side of inclusion when seeking permission to proceed with an investigation. In 2015, a pre-trial chamber second guessed the Prosecutor for deciding not to pursue alleged abuses by Israeli sailors in the context of the Mavi Marmara flotilla incident in which 10 people were killed (although an appellate panel’s subsequent ruling blunted the impact of this decision).

Looking ahead—choices and consequences

So what will the United States do now? Given that the government will see cooperation in these cases as a non-starter, the question is really how it will calibrate the tone and content of an adversarial response.

A return to the approach of using aid and other leverage to get States parties to acquiesce to U.S. demands seems unlikely. Demanding immunity agreements from partners that did not provide them years ago would yield abundant friction and precious little else. What’s more, while the court’s ability to bring charges and issue arrest warrants creates meaningful legal jeopardy, its lackluster pace and thin conviction record (it has not convicted a single defendant from a non-cooperating State) mean that this tribunal presents a less imposing profile than it did 15 years ago. Against this backdrop, and without a John Bolton-like figure to drive the process, it is hard to see the current thinly staffed State Department launching an anti-court diplomatic campaign spanning different parts of the globe as we witnessed in the early years of the Bush Administration.

Another aggressive (and similarly wrongheaded) alternative would be to come out swinging against the fundamental legitimacy of the court. That is what Israeli leadership did when the Prosecutor initiated her preliminary examination with respect to the situation in Palestine almost three years ago. They later backed off, one imagines at least partly on the advice of government lawyers, who must have seen the antagonistic rhetoric as unhelpful to dynamics with the Office of the Prosecutor. There are other considerations as well. While the United States might be tempted to assemble a chorus of voices to join it in a broadside against the court, this could place the U.S. government shoulder-to-shoulder with governments whose human rights practices it normally deplores. A final problem with a de-legitimization strategy is that the United States still supports what the court is trying to do in many situations. Would the United States really want to undermine the institution’s efforts to bring Omar Bashir and Congolese warlord Bosco Ntaganda to justice by suggesting that its efforts are fundamentally illegitimate?

Given the cramped legal and political space within which the U.S.-ICC relationship operates, there is no ideal course of action that has a realistic hope of success, but there is a possible option that might both appeal to U.S. interests and minimize the damage this confrontation does to other accountability efforts at and beyond the court. This third option would be for the United States to maintain the low-key public approach that it has taken to date, while relying on strong lawyering (as any defendant would do) to see if it can forestall more serious action like charges or arrest warrants. This appears to be the path that the Israelis have chosen, at least for now, and it seems more likely to yield the results that the U.S. government is seeking than a blunderbuss approach.

It is not clear, however, that the United States will go in this direction. ICC skeptics inside the U.S. government could seek to use the moment to drive a highly visible wedge between the United States and the court, although others will argue that this would neither help the U.S. government to protect its interests, nor serve the broader cause of accountability that the United States generally supports. At present there is no one in a senior role who has the background and expertise to navigate these issues effectively. Earlier this year, State Department leadership declined to renew Todd Buchwald—a leading international lawyer who is respected by both ICC skeptics and supporters throughout the government—as the head of the Office of Global Criminal Justice. At the time, the office was on the chopping block. Now that there has been a decision to retain it, State leadership should make every effort to reinstall Buchwald (who is planning his retirement), or failing that to find someone of comparable stature and expertise to take the role.

Another risk is that State Department lawyers, having failed to identify a credible basis for refuting the court’s territorial jurisdiction, will be pressured to advance a yet-to-be-determined meritless legal theory for the proposition that the ICC lacks all jurisdiction over non-party nationals. While parties facing legal jeopardy can be expected to advance aggressive arguments, it benefits no one when the United States throws its considerable weight behind non-credible positions—an impulse that State lawyers have been wise to resist.

Whichever way the U.S. government goes in engaging with the ICC, recent years have brought to the surface some painful challenges in reconciling its traditional support for global accountability with domestic political realities. It was no secret that the Obama Administration struggled to balance the drive for accountability with other considerations—including an effort to avoid the perception that Obama’s team would pursue politicized prosecutions of its opponents. These considerations led then-President-elect Obama to emphasize publicly in early 2009 his desire to “look forward as opposed to looking backwards.” In reality, the Administration did look back, including through a Justice Department investigation led by veteran prosecutor John Durham, but the advocacy community was sharply critical. They took the U.S. government to task for the forward-not-back frame (which they saw as in tension with the U.S. government’s international obligations), the scope of its accountability efforts (which they regarded as too narrow), and the way in which these efforts were conducted. Perhaps unsurprisingly, the prevailing view within the U.S. government was that it had judiciously threaded a difficult needle, and that the criticisms of its efforts were not wholly fair. Whether or not the distance between the two camps can be closed, the U.S. government should look for ways to share more information about the investigatory work it performed. The more the government can now demonstrate the rigor of specific accountability efforts (starting, for example, with releasing closely held information about the Durham investigation), the better it will be for the United States’ broader credibility as an advocate for accountability. It might help it with the ICC too.

Finally, it should be observed that this is a consequential moment for the court. In the best case, the Prosecutor’s decision to move forward against the world’s dominant military power (and, in recent years, friend of the court) will be seen as a move that cemented the institution’s independence and struck a principled blow against impunity for detainee abuse. It is also possible, however, that the positions that the court adopted on the way to taking this decision will pose lasting challenges that chip away at its standing and its effectiveness. How wide can the court cast its net and still have the capacity to pursue mass scale incidents of genocide and crimes against humanity? Will it have the political juice to persuade even its own States parties to enforce its decisions, particularly as it broadens the scope of its work? Are we headed for a world where the Court’s most stalwart supporters in Europe may be required to choose between the ICC and the United States in deciding whether to enforce an ICC arrest warrant? If they break in favor of the United States, what will be left of the court’s power and standing to effectuate warrants and perform other difficult tasks in other cases? The court might have chosen to implement its mandate so as to avoid some of these difficulties, but that would have created another set of problems—and in any case, the Prosecutor is clearly heading down a different path. Time will tell if it is the right one.