US Options for Responding to ICC Scrutiny in Afghanistan

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By [David Bosco](https://www.lawfareblog.com/contributors/dbosco)

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For the first time, the International Criminal Court (ICC) is poised to open an investigation that explicitly includes alleged crimes by U.S. personnel, setting up a possible confrontation between the United States and the court. Specifically, the ICC prosecutor is preparing to launch a full investigation in Afghanistan that will scrutinize U.S. detention practices in that country, but perhaps also at alleged "black sites" in Poland, Lithuania, and Romania. In November, the prosecutor said a decision on whether to open the Afghanistan investigation was “imminent,” and an announcement is expected soon.

ICC reports make clear that the office is interested in both CIA and DOD activities, particularly during 2003-2005. The prosecutor appears focused on whether there was a high-level U.S. policy of torture, and her office recently noted that it had expanded the scope of her examination to include alleged U.S. torture at sites outside of Afghanistan but with a connection to the conflict there. Given this focus, it is conceivable that the office might seek to prosecute former high-level U.S. officials.

Whatever its eventual outcome, an investigation of U.S. conduct establishes an important precedent regarding international criminal scrutiny of American personnel and will be of intense interest to the Pentagon, the intelligence community, and the State Department. The forthcoming investigation will also test the Trump administration's approach to the ICC and, more broadly, its attitude to key multilateral organizations.

The legal fault line between the United States and the court is relatively straightforward. The ICC maintains that it has jurisdiction over American conduct in Afghanistan because the latter is a member state that has granted the ICC jurisdiction over certain crimes on its territory. The American position, in contrast, has been that the ICC cannot exercise jurisdiction over Americans because the United States has not joined the Rome Statute, the 1998 treaty that created the court. “While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory,” a senior State Department official stated in 2002, “the United States has never recognized the right of an international organization to do so absent consent or a U.N. Security Council mandate.”

Both arguments are plausible, but the ICC has the much stronger legal hand. The U.S. position has limited support internationally and would almost certainly fail if adjudicated by ICC judges. The ICC and most legal scholars believe that ICC member states can delegate to the court the criminal jurisdiction they unquestionably have over their own territory.

A few observers, most notably Michael Newton at Vanderbilt Law School, have advanced a more nuanced argument against ICC jurisdiction based on the status of forces agreements (SOFAs) that Afghanistan entered into with the United States and NATO. Newton argues that Afghanistan ceded criminal jurisdiction over Americans when it agreed to these SOFAs and cannot therefore delegate that jurisdiction to the ICC. This argument has been less discussed but also has a low probability of success at the ICC (for a thoughtful response to Newton’s argument, see here).

The chances of the United States successfully challenging ICC jurisdiction through the court’s own processes are therefore slim. But that reality leaves open the policy question of how the United States should respond to ICC scrutiny.

For the ICC and many of its supporters, the appropriate U.S. response is simple: fully investigate and prosecute those responsible for its detention practices in the years following the 9/11 attacks. The U.S. government has undertaken several reviews, but they were either non-criminal in nature or limited so as to avoid review of high-level decisionmaking. With genuine domestic prosecutions underway, the United States would be protected by the complementarity principle and would not have to worry about the ICC investigation.

Whatever the merits of this argument, I assume for the purposes of this analysis that additional U.S. investigations and prosecutions are unlikely for a combination of legal and political reasons. I also assume that the prosecutor will conclude that U.S. investigations have been inadequate. Given those parameters, I see three broad options for the Trump administration:

Option 1: Delay and defer

The opening of a formal investigation in Afghanistan will generate headlines and will require some response from the Trump team. But nothing about the launch of the investigation compels the United States to take any affirmative steps; the prosecutor’s critical decisions regarding which individuals to prosecute are likely years away. For that reason, the administration could mostly choose to ignore the opening of an investigation.

In so doing, the United States could avoid (at least for now) a confrontation with a court that has broadly served U.S. interests and values by addressing mass atrocities in places like Sudan, the Central African Republic, the Democratic Republic of Congo, and Libya. During the latter half of George W. Bush’s administration and the entirety of the Obama administration, the United States forged a wary but productive working relationship with the court (within limits set by U.S. legislation). During the Obama years, senior officials interceded with the prosecutor to discourage any investigation of Americans but kept their communications quiet and avoided any open discord.

The Trump administration could effectively continue that policy by adopting a minimalist approach to the Afghanistan investigation and hoping that the prosecutor never brings charges against American personnel. Without U.S. assistance, after all, it is probable that the prosecutor will be unable to develop enough information to bring charges against American officials. At the very least, the United States could defer a decision on how to respond until it has no choice.

This course has the advantage of avoiding the diplomatic reverberations that would result from confronting the ICC more openly. But a delay and defer strategy carries some risks for the United States. The ICC may take a muted response as evidence that the United States has essentially acquiesced to its jurisdictional claims, a belief that could set the stage for damaging confrontations later.

Option 2: A “positive” red line

For a variety of reasons, the United States may decide it needs to frontally address the question of ICC jurisdiction over its nationals. One factor encouraging a robust response is the knowledge that Israel may face an active ICC investigation in the coming years, as the ICC has initiated a preliminary examination of alleged crimes in Palestine. Any eventual investigation there might include charges against senior Israeli officials for settlement policies and could therefore be politically explosive. If there is going to be a showdown about court jurisdiction over non-member state nationals, it may be best to have it now.

But there are several ways of confronting the issue of the ICC’s jurisdiction, and it is conceivable the United States could vigorously defend its position while also preserving a positive relationship with the court

One way to thread this needle would be to downplay the legal disagreement about the court’s jurisdiction and rely instead on arguments about how the prosecutor can employ her broad discretion to select cases within an investigation. Specifically, the United States could develop a policy paper making the case against exercising jurisdiction over U.S. nationals in Afghanistan. The prosecutor’s office has released a policy paper on its strategy for selecting cases within a situation, and the United States may want to frame its argument in terms of the criteria outlined there. (One potential argument would be that scrutiny of conduct more than a decade ago by U.S. personnel would have no deterrent impact on the large-scale ongoing criminality in Afghanistan.)

But a unilateral American approach to the court will likely have limited impact. The prosecutor will understandably view the U.S. arguments as a self-interested attempt to avoid scrutiny. Moreover, a strategy based on the specifics of the Afghanistan situation would not address the broader U.S. concerns about potential future ICC jurisdiction over non-member state nationals.

Internationalizing the issue could be more effective. While more than 120 states have joined the court, most of the world’s population (and most national military forces) are in non-member states. The administration could seek diplomatic support for its position that the prosecutor should avoid cases against non-member state nationals. A variety of influential non-member states—including China, India, Israel, Russia, and Israel—might be persuaded to construct a united front on the issue. In essence, these states could suggest a pragmatic compromise with the court by signaling their broad support for the court’s goals and operations while emphasizing the importance of a state’s consent to jurisdiction over its nationals.

Any limitations on the ICC’s reach will of course spark concerns about double standards. During the Rome Statute negotiations, a significant number of states advocated universal jurisdiction for the court and accepted the existing jurisdictional structure reluctantly. Concerns about unfairness in the application of international justice have been accentuated by Security Council referrals, which have allowed non-member states (most notably China, Russia, and the United States) to effectively instrumentalize a court they have not joined. This situation is understandably frustrating to many ICC members, and some have questioned the advisability of additional Council referrals. To address these concerns, the United States, China, and Russia might consider committing not to refer additional situations unless and until they join the court.

The ICC’s current fragility might encourage the prosecutor’s office to at least consider discretionary limits on the scope of its investigations. The fact that the prosecutor has avoided prosecutions of non-member state nationals to this point (other than when backed by a Council referral) suggests that it recognizes the sensitivity of the issue. It is also conceivable that some key ICC member states (and major funders)—including Japan, the United Kingdom and France—would quietly support such a compromise as being in the best interests of the court.

Pursued carefully, this strategy has a modest chance of success. It would not force the prosecutor to surrender her view of the court’s formal jurisdiction and might appeal to those in The Hague concerned about the institution’s long-term viability.

Option 3: A “negative” red line

It is likely that some voices in the Trump administration will advocate a more confrontational stance toward the court. Several advisers in the president’s orbit, including former U.N. ambassador John Bolton, have supported a strategy of undermining and delegitimizing the ICC. Voices in the Pentagon have also favored a more robust defense of U.S. sovereignty. Because support for the court in Washington is weak, there will be few domestic political repercussions for attacking an international court that may be targeting Americans.

If the United States chooses this approach, it could lead with its legal objections to any ICC exercise of jurisdiction over Americans and delineate concrete consequences if the prosecutor continues to investigate American conduct. The U.S. government has a variety of levers it could use (or threaten to use) to disrupt ICC activities. These measures would include ceasing all technical cooperation with the court, supporting additional Congressional legislation against the ICC, encouraging undecided states not to ratify the Rome Statute, pressuring existing ICC member states to leave the court, and using its veto on the Security Council to scupper any new referrals.

However popular at home, this approach would likely generate strong opposition abroad, particularly in Europe and Latin America, where support for the court remains strong. This opposition might in turn complicate other U.S. diplomatic and security initiatives. While the costs could be significant, the benefits likely would not be. Even an energetic and multifaceted U.S. campaign against the court would almost certainly fail to cripple it.

Those in the Trump administration inclined toward open warfare with The Hague might benefit from reviewing the recent history of U.S. diplomacy toward the court. After pursuing aggressive steps toward the ICC between 2002 and 2005, the Bush administration in its second term moderated its position to avoid diplomatic fallout with many of its traditional allies. There is no reason to return to a situation of unproductive animosity when there are other viable options to consider.