How to Respond When the International Criminal Court Goes after America

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For the first time, the International Criminal Court (ICC) is poised to open an investigation that includes alleged crimes by U.S. personnel. On November 20, prosecutor Fatou Bensouda asked a panel of judges to approve an investigation in Afghanistan that will scrutinize U.S. detention and interrogation practices in that country, as well as at alleged "black sites" in Poland, Lithuania, and Romania. The prosecutor wants to examine both CIA and military activities, and it is conceivable that the prosecutor might eventually pursue former high-level U.S. officials.

Some observers, including former UN ambassador John Bolton, [view](https://www.wsj.com/articles/the-hague-tiptoes-toward-u-s-soldiers-1511217136) the prosecutor’s move as confirmation that the court is animated by an anti-American agenda. The reality is very different. First, the inquiry into American conduct is just one part of a much larger investigation that will almost certainly focus on crimes by the Taliban, as well as alleged abuses by some Afghan government forces. Second, the prosecutor’s office dragged its feet for years on Afghanistan, likely because of the U.S. role and the prosecutor’s desire to avoid a messy confrontation with the superpower.

But if the Afghanistan move is hardly evidence of a rogue prosecutor, an investigation of U.S. conduct does require Washington to reconsider its policy toward the court. In early 2005, the United States moved away from its initial hostility to the court and has, since then, built a solid working relationship that includes cooperation on specific investigations.

But that rapprochement papered over a significant disagreement between the United States and the court about jurisdiction. The ICC believes it has jurisdiction over the nationals of non-member states, so long as they committed crimes on the territory of a member state. The U.S. position 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. Both arguments [are](https://scholarship.law.duke.edu/lcp/vol64/iss1/3/) [plausible](https://academic.oup.com/jicj/article-abstract/1/3/618/2188874), but the prosecutor’s view would certainly prevail if the court’s judges consider the matter.

That disagreement has now become acute, and the U.S. government faces difficult choices in crafting a response.

For the ICC and many of its supporters, the appropriate U.S. response is obvious: Investigate and prosecute through national courts those responsible for its detention and interrogation practices in the years following the 9/11 attacks. Several arms of the U.S. government have undertaken reviews, but they were either [non-criminal](https://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf) in nature or circumscribed so as to avoid high-level decisionmaking. With genuine domestic prosecutions underway, the United States would be protected by the ICC’s “complementarity” [principle](https://www.ictj.org/sites/default/files/subsites/complementarity-icc/), and the prosecutor should stand down. But the chances of the Trump administration (or, in truth, any U.S. administration) launching additional domestic investigations and prosecutions are remote. Given that reality, how should the United States respond to the court?

One tempting option is to do as little as possible, at least in public. That’s essentially the [advice](https://www.justsecurity.org/46990/international-criminal-courts-case-u-s-afghanistan-happened-future-holds/) of Stephen Pomper, the Obama administration’s point person on the court. He advocates “maintain[ing] the low-key public approach that [the United States] 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 was the strategy the Obama team followed as the prosecutor mulled whether to seek an investigation in Afghanistan. Administration officials said little in public but [quietly met](http://foreignpolicy.com/2014/12/03/the-war-over-u-s-war-crimes-in-afghanistan-is-heating-up-icc-hague/) with the prosecutor’s team to try to dissuade them from an investigation that would include U.S. conduct.

This approach has some important advantages. Even assuming the judges quickly approve an investigation, the United States has plenty of time. Decisions regarding which individuals to prosecute are likely months if not years away. And without U.S. assistance, which Washington will assuredly not provide, it is questionable whether the prosecutor will develop enough information to bring charges against U.S. officials. As former ICC official Alex Whiting has [argued](https://www.justsecurity.org/46687/icc-investigation-u-s-afghanistan-mean/):

"[T]here will be no cooperation from the Afghan government, the Taliban, or the U.S….While some alleged victims will be available to be interviewed in other locations, and some evidence of the alleged crimes in Afghanistan and the black sites has been developed and made available by other inquiries, there is no question that it will be extremely difficult for the ICC to develop evidence to prove culpability beyond a reasonable doubt."

Given this, the United States could defer a decision on how to respond until it has no choice. In so doing, the United States could avoid for now a confrontation with a court that has broadly served U.S. interests and values by addressing mass atrocities in places like [Sudan](https://www.icc-cpi.int/darfur), the [Central African Republic](https://www.icc-cpi.int/car), the [Democratic Republic of Congo](https://www.icc-cpi.int/drc), and [Libya](https://www.icc-cpi.int/libya).

But a low-key, wait-and-see approach has some significant drawbacks as well. The prosecutor’s decision to investigate U.S. conduct demonstrates that the approach that the Obama administration took has not worked thus far. American officials were unable to convince the prosecutor that the alleged crimes are not serious enough to merit international investigation or that the U.S. government had done enough on its own to address the allegations. In fact, the prosecutor expanded the scope of her investigation of U.S. conduct even as U.S. officials engaged with her office. Doubling down on a failed strategy of quiet persuasion may not be the best option.

Actual prosecutions of U.S. officials may be unlikely, but the administration needs to reckon with what the consequences would be if they materialized. True, the ICC has no enforcement arm. But indictments would create major diplomatic problems. Let’s assume the ICC issued an arrest warrant for former CIA director [George Tenet](https://www.nytimes.com/2014/12/13/us/politics/ex-chief-leads-vocal-defense-of-spy-agency.html), attorney general John Ashcroft, or even former president George. W. Bush. Any United States administration would feel compelled to not only reject the indictments, but also to take measures against the court and any states that would cooperate with it. Given these stakes, it’s worth signaling publicly to the court the seriousness of the issue and preparing the ground.

There are also American allies to think about. Israel may face an active investigation in the coming years. The ICC has initiated a preliminary examination of alleged crimes in Palestine, and any investigation there could include charges against senior Israeli officials for settlement policies.

If there is going to be a showdown about court jurisdiction over non-member state nationals, it would be best to have it before there are actual indictments.

I’ve [argued previously](https://www.lawfareblog.com/us-options-responding-icc-scrutiny-afghanistan) that drawing a line with the court need not take the form of the immediate hostility that John Bolton favors, and which no doubt appeals to many in Trump administration. One way to thread the needle would be to reiterate American support for the court, but as an institution for its member states. Linking arms with other non-member states could increase the impact of this strategy. While more than 120 states have joined the court, non-member states account for most of the world’s population, resources, and military forces. A variety of influential non-member states—including China, India, Indonesia, Israel, Russia, and Turkey—might join a united front on the issue of ICC jurisdiction over non-members.

Working with other non-member states would make the issue less about specific allegations against the United States and more about the principle that an international court should not exercise criminal jurisdiction over the nationals of states that have not joined it (absent action by the UN Security Council). In essence, these states could advocate a pragmatic compromise with the court by signaling their broad support for its goals and operations while emphasizing the importance of a state’s consent to jurisdiction. That position would hardly eviscerate the court’s docket; most of the court’s work has involved investigations and prosecutions of member-state nationals.

The ICC’s fragility might encourage the prosecutor’s office to 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 (except when backed by a UN Security Council referral) suggests that the Court recognizes the sensitivity of the issue.

It is also possible 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. The ICC has a poor record thus far of investigating when the states most involved are not supportive. The cases it brought against several senior Kenyan officials collapsed in the face of that government’s non-cooperation. More failed or inconclusive investigations will not serve its interests.

Even if pursued carefully, a strategy of encouraging prosecutorial restraint toward non-member states has at best a modest chance of success. The prosecutor would face howls of outrage from some member states and influential NGOs if she publicly accepted any limits to the court’s reach. But at the very least, adopting a concerted strategy would allow the United States to advance, elaborate, and seek international support for the arguments that it will need if the situation with the ICC goes from bad to worse.