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Balancing the US Approach to the ICC

by Brian L. Cox
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With the recent expiration of Donald Trump's presidency, much of the global community seems ready to close the chapter of instability and unpredictability that defined U.S. foreign policy under the Trump administration. One aspect of Trump's foreign policy was a rekindling of the conflict, which waxes and wanes depending on the prevailing domestic political climate, with the institution of the International Criminal Court (ICC).

As the Biden administration develops a new direction in American foreign policy, the ICC is similarly engaged in the endeavor to chart a new institutional course. As Todd Buchwald recently summarized in *Just Security*, "the Court is at an inflection point in its history." With the nascent reset of U.S. foreign policy in the making, relations specifically between the United States and the International Criminal Court are at an inflection point as well.

This post examines some considerations that may be useful in the endeavor to build a more balanced U.S. approach to the ICC. Because an assessment of America's foreign policy interests in relation to the ICC depends to some degree on how the Court emerges from its own current inflection point, the analysis addresses suggestions regarding both the future direction of the ICC and of America's approach to the ICC. (It is worth noting that I was an operational law advisor and then the Chief of International and Operational Law for a Regional Command in Afghanistan from 2013-14. The current ICC investigation involving the Situation in Afghanistan that could specifically include US personnel focuses on allegations of detainee abuse from 2003-04, which is 10 years before my deployment to Afghanistan.)

First, the current U.S. posture toward the ICC is outlined to set the stage for the assessment that follows. With the current posture briefly assessed, two central factors in the effort to develop a more balanced approach – complementarity and the role of international criminal law – are evaluated. A separate, overarching obstacle to developing a balanced approach to the Court is that many narratives suggesting closer alignment with the ICC constitute advocacy branded as objective policy prescriptions; however, an evaluation of these narratives is beyond the scope of the present article. Future work may take up this topic.

Current Posture: Adoption and Implementation of EO 13928

While the approach of the Trump administration was initially to "provide no support in recognition to" the ICC, then-Secretary of State Mike Pompeo signaled a more hostile stance in May 2020, soon after the ICC Appeals Chamber approved a request submitted by the Prosecutor to investigate the "Situation in Afghanistan" – an investigation that could involve U.S. nationals. This antagonism culminated in the June 2020 issuance of Executive Order (EO) 13928, the title of which does a fair job of summarizing its purpose: Blocking Property of Certain Persons Associated With the International Criminal Court. As one might expect, such an unprecedented move against the ICC sparked a torrent of public discourse – mostly in the form of condemnation – both in the United States and abroad.

When Fatou Bensouda, the Court's chief Prosecutor, and Phakiso Mochochoko, Head of the Jurisdiction, Complementarity and Cooperation Division, were added to Treasury's Office of Foreign Assets Control "Specially Designated Nationals" (SDN) list as authorized by EO 13928, open conflict between the United States and ICC transitioned from an abstract possibility to a practical reality. The implications of the designation reverberate far beyond the two named individuals – who themselves are of course directly affected – as the restrictions adopted by the Executive Order extend to "any

foreign person" determined by the government "to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of" any effort by the Court "to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States."

The far-reaching nature of the potential sanctions against "any foreign person" found "to have materially assisted" the ICC in its effort to investigate U.S. persons – in practice, for crimes potentially committed in the context of the conflict in Afghanistan – prompted four U.S. law professors with dual nationality to initiate a civil proceeding in federal court to challenge the constitutionality of the Executive Order. While the "conspiracy to violate" provision of the Executive Order (Sec. 5 (b)) could ostensibly be applied against U.S. *and* foreign nationals, the "materially assisted" provision applies by its terms only to "any foreign person" – so the dual nationality of the four complainants puts them at particular risk of contravening the Order.

However, these risks may now be moot. If the Biden administration follows the pattern of past Democratic administrations, EO 13928 and its associated sanctions will likely be quickly reversed. While it is true that President Joe Biden faces a scenario not encountered by his Democratic predecessors– namely, an active investigation by the ICC that could potentially directly involve U.S. nationals – the president's prior record and campaign messaging related to foreign policy indicate that the openly hostile approach of the Trump administration will not continue under Biden. Indeed, a State department spokesperson announced days after the inauguration that the administration will "thoroughly review" the sanctions designations.

Biden's "restoring America's place in the world" vision is much different from his predecessor's "America first" approach, and relations with States Party to the Rome Statute – as well as with the Court itself – will reflect that change. As the new course is charted by the Biden administration, the driving factor should be a balanced assessment of how the approach to the ICC will support America's foreign policy interests. One of the most important factors in that assessment is the manner in which the ICC as an institution operationalizes the complementarity principle reflected in the Court's founding treaty.

The Canard of Complementarity

While contemporary international criminal law dates back to the end of World War II, at least two main factors set the ICC apart from predecessors such as the post-war and *ad hoc* tribunals. First, unlike its predecessors, the ICC is a permanent, standing international tribunal. Second, the Rome Statute allows for the ICC Prosecutor to initiate a *proprio motu* investigation that the Court can then go on to adjudicate without referral from any State (under certain circumstances).

However, the Court's status as a permanent and self-directed institution is theoretically limited by the complementarity principle, which establishes the role of the ICC as a "court of last resort." Any application by the Prosecutor to convert a *proprio motu* preliminary inquiry into a full investigation must be approved by the tribunal; likewise for initiation of a full criminal proceeding. The tribunal is itself bound by the principle of complementarity (noted in Articles 1 and 17 of the Rome Statute). Surely, given these constraints, the ICC truly must operate as a court of last resort. Right?

According to the prevailing perspective, it unequivocally does. The president of the ICC, Dr. Chile Eboe-Osuji, succinctly summarized this role in a June 2020 *New York Times* opinion piece by asserting that the ICC "is only a court of last resort" and that it is "only when questions of accountability for international crimes have remained unaddressed that international law allows" the ICC to get involved.

In a separate *Newsweek* interview, Eboe-Osuji states, "If the U.S. considers that it is adequately addressing the allegations of crimes through its own courts, or that they have done that already, then this is the moment to inform the Court and bring that question before the judges. There is a clear legal mechanism for doing that, and so far the United States has not availed itself of that path."

These reflections distort relevant international law on at least two separate grounds. First, the jurisdictional provisions of the Rome Statute do not oblige a member State to initiate a court proceeding in order to satisfy the State's obligations pursuant to the treaty. Rather, Article 17 ("Issues of Admissibility") requires the Court to determine that a case is inadmissible if the relevant state is investigating *or* prosecuting the offense or if the state *has investigated* the allegations and declined to initiate prosecution.

To overcome this requirement, the Court would need to determine that the relevant State is "unwilling or unable genuinely to carry out the investigation *or* prosecution." (emphasis added) The Rome Statute requires the ICC to determine that a case is inadmissible if a State Party has investigated an allegation and declined to prosecute, "unless the [declination] decision resulted from the unwillingness … of the State genuinely to prosecute."

In assessing the "unwillingness" of a State Party to prosecute after an investigation, the Court must determine that "the national decision was made for the purpose of shielding [an alleged offender] from criminal responsibility for crimes within the jurisdiction of the Court." While successive administrations have declined to *prosecute* allegations that are currently being investigated by the ICC, these are legitimate sovereign decisions – and there is no indication that such decisions have been made "for the purpose of shielding" alleged offenders from trial before an international tribunal of which the United States is not a member in the first instance.

The president of the ICC fundamentally misrepresents this complementarity requirement when he claims that the United States must investigate *and prosecute* alleged offenders in order to satisfy the tribunal. This misrepresentation of international law – here, the plain text of the Rome Statute – pales in comparison to the reflection that there "is a clear legal mechanism" for the United States to demonstrate the validity of the domestic accountability process "before the judges" of the ICC and that the government "has not availed itself of this path."

In fact, the United States is not obliged to demonstrate *anything* to judges of an international tribunal established by a multilateral treaty that has not been ratified by the people of the United States. Suggesting otherwise, as the president of the ICC does by asserting that the United States should "bring that question [of domestic investigation and prosecution] before the judges" of the tribunal, represents a fundamental misapplication of international law.

While Eboe-Osuji's misstatement of the complementarity principle and misapplication of fundamental principles of international law are particularly stark, he is certainly not alone in invoking the status of the ICC as a court of last resort to insist that the United States should justify domestic declination decisions to the Court.

In criticizing the sanctions program authorized by Trump's executive order, for example, Leila Sadat points out that the ICC "is simply a Court of last resort, which steps in if no State is able or willing to prosecute those accused of committing the most heinous crimes known to humankind." Likewise, Elizabeth Evenson of Human Rights Watch emphasizes that the ICC "acts as a backstop and a court of last resort when countries themselves fail to – or cannot – achieve justice for their citizens." Similarly, a letter published by the New York Bar Association criticizing separate letters regarding the ICC published by the House and Senate cites the Rome Statute "complementarity regime" to suggest that if the United States (or, separately, Israel), "were to investigate and/or prosecute the crimes under examination, that *would* divest the ICC of jurisdiction." (emphasis in original)

It is worth noting that the first two examples of the complementarity narrative cited directly above misstate the complementarity arrangement reflected in the Rome Statute by describing a requirement to "*prosecute* those accused" and "*achieve justice*" – rather than, as the relevant text of the treaty establishes, investigate *or* prosecute. Although the letter from the NYC Bar Association cited directly above at least correctly describes the "complementarity regime" by citing the requirement to "investigate and/or prosecute," this observation erroneously suggests that the ICC has any jurisdiction from which it could be divested by a domestic investigation and/or prosecution instituted by a State that has not ratified the Rome Statute in the first instance.

While the above analysis is centered on perspectives related to application of the complementarity principle, thus far the analysis hasn't addressed whether the United States actually *has* investigated and/or prosecuted the "crimes under examination" by the ICC. This is a central consideration in the discussion of whether the tribunal would currently be complying with the complementarity principle even if the United States *were* a State Party to the Rome Statute.

The Investigations

Former ICC Prosecutor Luis Moreno Ocampo offers a useful overview of the investigative efforts that have been performed by the United States involving allegations of offenses that are currently also under investigation by the ICC Prosecutor. Ocampo refers to inquiries by the U.S. Army and the CIA Inspector General, the report published in 2008 by the Senate Armed Services Committee, and the report published in 2012 by the Senate Intelligence Committee.

After referring to these sweeping domestic inquiries in passing, Ocampo notes that President-elect Obama observed during an interview just before taking office that the United States "tortured some folks" but, according to Ocampo, both the Obama and Trump administrations engaged in strategies designed "to protect U.S. operations from any judicial investigation." This criticism once again mischaracterizes the complementarity arrangement established in the Rome Statute, which renders a case inadmissible if a State investigates or prosecutes – but does not specify a particular type of investigation, nor limit this effect to only "judicial investigation" as suggested by Ocampo.

And that brings us to an assessment of the evidence involving potential abuses committed by U.S. nationals that forms the basis of the application by the ICC Prosecutor to investigate (among other parties) U.S. nationals in the situation in Afghanistan. The initial application makes mention of a number of the investigations already conducted by the U.S. government early in the document – which raises questions about the legitimacy of the inquiry right from the beginning, given application of the complementarity principle.

What follows, as the application lays out the evidence indicating that U.S. nationals may have committed Article 5 crimes, makes a mockery of the Rome Statute complementarity principle. Throughout the report, in page after page after page after page (35 pages in total, if my count is accurate), the Office of the Prosecutor (OTP) application cites *directly to* evidence developed in the various investigations conducted by the U.S. government.

Now, it is of course a matter for the Court – and not the Prosecutor – to determine whether a decision by the applicable national government not to prosecute relevant personnel following such national investigations "resulted from the unwillingness or inability of the State genuinely to prosecute." To give context for what qualifies as an unwillingness to genuinely prosecute, as described above, the relevant factor established in the Rome Statute suggests that the Court should consider whether the investigation was "undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility."

While the genuineness of a national process is ultimately a matter for the Court to determine, if the Prosecutor is going to rely so heavily on existing national investigations to make the case to initiate a *proprio motu* ICC investigation then there should be some discussion of the genuineness of these national investigations. Relying on national investigations to make the case for an ICC investigation and then ignoring an assessment of whether the national decision to decline criminal prosecution was made "for the purpose of shielding" is not the action of a "court of last resort" as the ICC is so often described.

What this endeavor constitutes instead, to borrow from the characterization of the U.S. delegation during negotiations that led to adoption of the Rome Statute, is "a Court that exists to sit in judgement on national systems or second-guess each action and intervene if it disagrees." During negotiations in Rome more than two decades ago, U.S. delegate Bill Richardson warned that "[w]e are not here to create" such a tribunal.

Yet this is precisely the endeavor in which the ICC is currently engaged. It bases the U.S. aspect of the Afghanistan inquiry primarily on national investigations that successive administrations, of both major political parties, have declined to resolve with criminal prosecutions.

The United States is under no obligation to explain to the ICC the decision not to pursue criminal prosecutions involving the matters the tribunal is currently investigating. Moreover, the Prosecutor's reliance on existing comprehensive national investigations to request authority to initiate a full investigation – without addressing the "purpose of shielding" factor at all – makes a sham of the complementarity principle. The ICC cannot be accurately described as a "court of last resort" in this context.

Rebranding the Role of International Criminal Law

A second consideration in the development of a more balanced U.S. approach to the ICC is the fundamental question: What is the role of international criminal justice as a body of law?

Until recently, the answer to that question was fairly straightforward. As then-ICC President Philippe Kirsch observed in 2006 during remarks delivered to commemorate the 60th anniversary of the Nuremberg Judgement, "Ensuring accountability [in international criminal law] is important in itself, but it is also important because allowing impunity for widespread or systematic atrocities can have *serious consequences for international peace*." (emphasis added)

This sentiment was similarly expressed by the U.N. Security Council when adopting the measure that approved the establishment of the first *ad hoc* tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY). There, the Security Council expressed a determination to "bring justice to the persons responsible" for committing atrocity crimes. The reason expressed for this resolve is that the Council was convinced that "the establishment of an international tribunal would enable this aim to be achieved [individual accountability] and would contribute to the *restoration and maintenance of peace*." (emphasis added) Almost two years later, the Security Council expressed similar sentiments when adopting the resolution that established the second *ad hoc* tribunal, the International Criminal Tribunal for Rwanda (ICTR).

In the context of the main predecessors to the ICC – the post-World War II tribunals and the later *ad hoc* tribunals (the ICTY and ICTR) – the unifying factor that allowed sufficient consensus to create the tribunals was a recognition that an international tribunal must be established to correct an inefficiency that existed in prevailing international law. The inefficiency was that *in the absence* of some sort of functioning domestic adjudicative mechanism, offenders could commit atrocity crimes with impunity and this gap, to borrow from Kirsch's reflection, can have serious consequences for international peace.

This vision of deterrence in support of international peace and security is by no means the *only* justification for the body of law we now call "international criminal law" that has emerged since the end of World War II. The preamble of the Rome Statute, for example, recognizes that atrocity crimes "threaten the peace, security and well-being of the world" and the States Parties express therein a determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."

However, the preamble to the Rome Statute *also* expresses the resolve to "guarantee lasting respect for and the enforcement of *international justice*" – that is, justice as its own end, detached from considerations involving the maintenance of international peace. Likewise, the founding treaty establishes the "interests of victims" as a factor for the Prosecutor to consider in deciding whether to initiate an investigation, and the potential for reparations to victims of atrocity crimes is an important factor for the Court to consider during sentencing.

As I noted at the beginning of this section, the primary purpose(s) of international criminal law, and the role of the ICC in exercising that law, are deeply philosophical matters that have very real practical consequences – none of which can be adequately addressed in this post. The point, though, is that as the Court approaches the present inflection point, those responsible for shaping its direction – either directly as part of the institution or indirectly on pages such as these – must reflect on what exactly the role of the tribunal as an institution in international law will be in the future.

If the primary role is to contribute to international peace and security by providing a forum to adjudicate atrocity crimes where no other such forum exists, the ICC will undoubtedly remain as an important asset to the international community writ large. If, instead, the primary role is to deliver "international justice," then it will increasingly find itself acting as a check on functioning national jurisdictions (as is the case with the U.S. aspect of the "Situation in Afghanistan" and the recently-closed preliminary examination involving the UK) or ruling on declarations of statehood notwithstanding international disagreement, including among Rome Statute signatories (as is the case with the ongoing preliminary examination involving the "State of Palestine"). Adopting this latter role will place the ICC as an institution in peril in the long run.

This is so because, as a treaty-based international institution, the ICC relies on the continued domestic political support of each constituent member – not only for cooperation, but for its very existence. Standing in judgement of functioning national jurisdictions risks eroding domestic political support among the very constituencies upon which the ICC relies for its continued existence. If this support crumbles, the ICC will be ineffective in the pursuit of *both* international peace and international justice.

Unfortunately, both for the ICC and for the international community, it appears that the current vision is not for the tribunal to correct a gap in existing justice mechanisms but rather to judge the performance of domestic justice systems. While Eboe-Osuji observes that the "ICC does not try countries," he goes on to assert that "now the ICC is insisting that justice based on evidence must be pursued by somebody, somewhere — if not in the United States or Afghanistan, then at the ICC."

And the basis for this "insistence"? Eboe-Osuji claims that "there are allegations of gross human rights violations in Afghanistan that victims complain have waited far too long without investigation or prosecution." While this observation does not account for the extensive investigations conducted by the United States, as discussed above, this reflection by the ICC President is troubling for an even more fundamental reason.

It is true that the ICC is not attempting to put the United States government on trial in the literal sense. However, the tribunal is nonetheless asserting a right to second-guess the sovereign decisions of successive administrations not to initiate criminal prosecutions based on the allegations being

investigated by the Court. The role of the ICC is not to supersede functioning domestic processes and insist that its own version of "justice" be implemented by national jurisdictions. This course is inconsistent with the original purpose of international criminal law, and it constitutes a fundamental threat to the continued effectiveness – and even existence – of the Court.

Concluding reflections

The foreign policy of the United States and the institutional vision of the ICC are both at an inflection point. The United States will almost certainly be recalibrating its approach to the ICC – again – under the new administration. The ICC, in turn, will be internalizing and implementing recommendations of the Independent Expert Review published last year in response to the mandate from the Assembly of States Party to "identify ways to strengthen the ICC and the Rome Statute system in order to promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning." During this period of reflection and internalization, the process of electing the next Prosecutor continues.

If the ICC insists on continuing to operate as a quasi-sovereign to stand in judgment of legitimate national investigation or prosecution processes, the Court can expect continued wariness – and perhaps open hostility depending on the political climate of the day– from the United States. There will be no shortage of voices in a global chorus to decry "perceptions of a double standard at the ICC, with one standard for powerful countries and another for those with less clout" if the ICC departs from its current trajectory of second-guessing legitimate national processes. These voices may influence the institutional direction of the ICC and may likewise advocate in favor of ever-closer alignment with the ICC, but these perspectives do not necessarily constitute sound national policy.

The Rome Statute does not represent a constitutional edict in the "global rule of law" that establishes the ICC as a tool to "catalyze pressure" on a functioning government to pursue prosecutions of alleged atrocity crimes after a thorough domestic inquiry. Scholars and advocates may disagree with individual outcomes in national jurisdictions, but this is a matter of concern for domestic politics – not forum shopping at the ICC. Likewise, an approach that "centers victims' access to justice" sounds appealing, but it also represents a fundamental shift in the central purpose of international criminal law – which has been, historically, to dissuade violation of peremptory norms by creating an adjudication mechanism in the absence of such a forum and to thereby support international peace and security.

There is a need for genuine and balanced reflection about the path ahead by those at the ICC and in the Biden administration. For the latter, a judicious and objective evaluation of American foreign policy interests is imperative.

On this note, the New York City Bar Association is undoubtedly correct to observe that the "work of" the ICC "is largely aligned with U.S. interests" *in general*. It is not the institution that poses a "threat to the national security and foreign policy of the United States" in the abstract. Rather, it is the manner in which the jurisdiction of the Court is currently being contemplated to second-guess legitimate sovereign political decisions – with the potential to oblige member States to cooperate with a process to which the United States has not consented – that constitutes the threat to U.S. national security and foreign policy.

A return to the approach by the Obama administration may be the best course for the United States. This policy was described in the 2010 National Security Strategy: "Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law."

As the senior legal adviser to the Department of State, Harold Koh described steps the United States undertook to coordinate "with States parties to the Rome Statute on issues of concern" by applying "a pragmatic, case-by-case approach towards ICC issues." The second National Security Strategy of the Obama administration, published in 2015, similarly expressed the commitment to "work with the international community to prevent and call to account those responsible for the worst human rights abuses, including through support to the International Criminal Court, consistent with U.S. law and our commitment to protecting our personnel."

Endeavoring to return to a "pragmatic, case-by-case approach" to the ICC is a constructive guiding principle as the new U.S. policy is being developed and implemented. However, the difference between then and now is the current investigation involving the "Situation in Afghanistan" that could purport to stand in judgment of the decision by successive administrations not to initiate criminal prosecutions for the matters being investigated by the ICC.

This will unquestionably affect the calculation regarding what level of cooperation advances "U.S. interests and values" while remaining consistent with America's "commitment to protecting our personnel." Nonetheless, by conducting an objective assessment of the Court's practical and conceptual role in international law and by engaging with States Party and the Court itself, a more balanced U.S. approach to the ICC can be achieved.

Image: On 18 January 2019, the International Criminal Court ("ICC" or "Court") marked the opening of its judicial year with a Special Session at the seat of the Court in The Hague, Netherlands. The event gathered senior judges representing national jurisdictions as well as regional or international courts, and members of the diplomatic corps, civil society and international organisations.

About the Author(s)

Brian L. Cox

Adjunct Professor of Law, Cornell Law School; Visiting Scholar, Queen's University Faculty of Law, Ontario. He retired in 2018 from the U.S. Army after 22 years of military service. He served as an airborne infantry soldier, combat camera operator, airborne infantry officer, and for seven years as a military legal advisor.