Just Security is pleased to launch this online symposium—spearheaded by Professor Laura Dickinson—which is focused on the International Criminal Court’s (ICC) probe in Afghanistan and its implications for the United States.

As I discussed last week (in Part I), the United States may decide to argue that the International Criminal Court cannot exercise jurisdiction over U.S. personnel for alleged war crimes committed in Afghanistan due to a series of Status of Forces Agreements (SOFAs) executed by Afghanistan. I discussed those agreements in detail. Turning now to the potential impact of the various agreements on the ICC’s jurisdiction, let’s begin with some basics.

**Jurisdictional Backgrounder**

At the outset, it is useful to recall that international law recognizes several bases on which a state can exercise domestic jurisdiction.

As a general rule, a sovereign can exercise jurisdiction over persons found within its borders and over conduct committed within its borders—so-called territorial jurisdiction. As a matter of course, most states also assert active personality jurisdiction, which involves the exercise of jurisdiction over crimes committed by their nationals when abroad. The passive personality principle—which used to be less prevalent in state practice but is now more widespread given the enactment of domestic terrorism and trafficking statutes—allows for states to exercise jurisdiction over crimes committed against their nationals, even when committed abroad. (The United States, for example, exercises passive personality
jurisdiction over various terrorism crimes, war crimes, and even the simple murder or assault of a U.S. citizen abroad so long as the Attorney General or a designee certifies that the offence was intended to coerce or intimidate a government or civilian population. The effects principle allows for assertions of jurisdiction over criminal conduct that occurs outside a state’s territory but causes an internal effect. The protective principle authorizes the exercise of penal jurisdiction over extraterritorial acts that threaten state security, endanger the political or territorial integrity of a nation, or undermine the operation of essential governmental functions (e.g., forgery). Finally, under the universal principle, all states can exercise jurisdiction over certain grave international crimes, such as those contained in the ICC Statute. Jurisdiction often runs concurrently, which is to say that a dispute with transnational elements may be dealt with by any number of states: the state on whose territory key conduct occurred, the state of nationality of the perpetrator(s), and the state of nationality of the victim(s).

Likewise, the concept of jurisdiction is not monolithic; it actually encompasses three distinct strands or constructs: prescriptive, adjudicative, and enforcement jurisdiction. Each comes in an extraterritorial version.

- Prescriptive jurisdiction relates to the power to prescribe rules regulating conduct, including conduct committed abroad.
- Adjudicative jurisdiction embodies the power subject individuals and entities, including foreign parties, to a judicial process.
- Enforcement jurisdiction encompasses the power to enforce the law, and punish non-compliance, at home or abroad by, for example, arresting a suspect. States are ordinarily deemed to have close to exclusive enforcement jurisdiction within their territories as well as the sovereign right to prevent other states from taking coercive legal measures on their territory without their consent.

The Delegated Jurisdiction Theory
With this background in mind, scholars have put forth a theory that the ICC has no jurisdiction over DOD personnel because Afghanistan essentially relinquished the right to exercise penal jurisdiction over deployed U.S. personnel upon executing the various SOFAs (detailed in Part I) and thus cannot “delegate” its territorial jurisdiction to the ICC during any period in which a SOFA is in place or with respect to any potential defendant subject to one of the SOFAs.

This argument is premised on a theory of delegated jurisdiction whereby ICC member states upon ratification of the ICC Statute delegate to the ICC jurisdiction over crimes that they could otherwise prosecute because such crimes were committed on their territories (or by their nationals). If Afghanistan has indeed relinquished its domestic jurisdictional competency by virtue of the SOFA, it had nothing to “delegate” to the ICC pursuant to the old maxim *nemo dat quod non habet* (“one cannot give what one does not have”).

In addition to this treaty-based delegation theory, there is a broader customary international law argument that has been advanced, whereby forces on the territory of a host state with that state’s permission bring with them a customary international law immunity from prosecution. This post only tangentially engages that theory (see the discussion below on *Lozano*) and focuses primarily on the impact of the various Afghanistan SOFAs and other agreements on the Court’s potential jurisdiction. In addition, there are various immunity arguments that might be advanced; these are addressed in other contributions to this symposium.

**Counterarguments to the Relinquishment of Jurisdiction Theory**

There are a number of questions that the ICC will need to grapple with if it is ever confronted with this line of argument and a number of counter-arguments that the United States will need to anticipate if it is called upon to contest ICC jurisdiction and decides to advance the relinquishment of jurisdiction theory.

1. **Questions of Chronology**
For one, there is the question of timing: assuming that the ICC’s jurisdiction is premised on a delegation of territorial authority, the delegation was complete on May 1, 2003. This date falls after the January 3, 2002, entry into force of the MTA but prior to the May 28, 2003, entry into force of the bilateral SOFA. Status determinations are complicated by the simultaneous existence of multiple operations, so the delegation argument might not apply equally to troops deployed under different missions.

Arguably, *nemo dat quod non habet* works in reverse for OEF personnel: Afghanistan purported to give something to the United States in the bilateral SOFA with respect to OEF personnel that it no longer had to give because it had already ratified the ICC Statute. (This timing argument may be undercut by the fact that the SOFA is actually an exchange of notes that occurred in September and December of 2002; the final agreement, however, did not go into effect until May 28, 2003).

A response to this argument might be the last-in-time rule, which states that if two legal instruments are incompatible, the last enacted rule governs. Under a strict application of a last-in-time rule, the later SOFAs would trump Afghanistan’s delegation of jurisdiction to the ICC. While Afghanistan delegated jurisdictional competency to the ICC, this is revocable as evidenced by Article 127 of the Statute and the planned withdrawals of Burundi and the Philippines from the ICC. Article 127, however, is an all-or-nothing provision. It does not envision a partial or tailored withdrawal from the Court’s jurisdiction. This would imply that Afghanistan may not be empowered to pull back a portion of its delegated powers by virtue of a subsequent bilateral SOFA. As such, once a state’s ratification enters into force, any delegation of jurisdictional competency remains effective until the state officially withdraws from the ICC Statute.

2. **Who Is Bound by the SOFAs?**
Second, is the question of who is bound by the SOFAs. While the SOFA clearly binds Afghanistan—as the host state—and prevents it from proceeding with a domestic prosecution against a covered individual, Afghanistan cannot grant the United States exclusive jurisdiction over its own personnel as against any other court—foreign or international. This particularly holds true for the OEF SOFA, which is a bilateral agreement that does not apply in other jurisdiction or bind any other institution. In other words, any potential legal liability of a covered person is not extinguished entirely. As the U.S. Department of State “explainer” on diplomatic immunity created for U.S. law enforcement personnel puts it:

[diplomatic] immunity is simply a legal barrier which precludes U.S. courts from exercising jurisdiction over cases against persons who enjoy it and in no way releases such persons from the duty, embodied in international law, to respect the laws and regulations of the United States.

As such, while Afghanistan must respect the SOFA in its horizontal relations with the United States—as co-equal sovereigns—other judicial institutions can proceed with a prosecution of a U.S. servicemember for crimes committed in Afghanistan if warranted according to their operative legal frameworks. So, for example, if a U.S. servicemember committed a criminal act against the national of a third state, that third state could prosecute the U.S. servicemember pursuant to the passive personality theory of jurisdiction (assuming no SOFA applied as between the United States and the third state).

When it comes to the ICC, this argument suggests that while Afghanistan may have relinquished its own jurisdiction over U.S. forces, it cannot modify the terms of the ICC Statute and thus divest that Court of jurisdiction that it would otherwise enjoy by virtue of Afghanistan’s ratification of the Rome Treaty. By this theory, the Court is empowered to investigate persons covered by the SOFAs so long as it does not ask Afghanistan to surrender anyone.

The case of Mario Luiz Lozano v Italy [Italian Supreme Court of Cassation], Judgment No 31171/2008 (24 July 2008) is instructive. A U.S. soldier stationed in Iraq killed an Italian intelligence officer and injured two other Italian nationals at
a checkpoint. An Italian prosecutor brought charges in Italy. The lower court determined that under customary international law, a military force deployed on the territory of a foreign state was subject to the exclusive jurisdiction of the sending state.

On the prosecutor’s appeal, the court of cassation took a different approach. It rejected the customary international law theory advanced by the lower court and determined that the SOFA between Iraq and the United States exclusively concerned only the sending and host states; it did not block a third state that was participating in the multinational force from exercising passive personality jurisdiction on behalf of its national. However, the appeals court ultimately applied a theory of foreign sovereign immunity—the immunity enjoyed by the state—to block the prosecution on the ground that the U.S. soldier was essentially an organ of the state acting on behalf of the United States and engaged in an acta iure imperii—an act of a governmental nature as opposed to a private or commercial act.

In this case, the charge was simple murder. The appeals court was careful to note in dicta that this rule of foreign sovereign immunity would not necessarily cover the commission of crimes under international law on the theory that rules of jus cogens would prevail over rules on immunities. My summary of Lozano, which is in Italian, is gratefully drawn from this account.

Note that in the United States, foreign sovereign immunity is governed exclusively by the Foreign Sovereign Immunity Act, which contains a number of exceptions to foreign sovereign immunity, including one devoted to terrorism and other international crimes (see our coverage here). The Supreme Court has determined, however, that the FSIA does not apply to individuals but rather only to organs or instrumentalities of the state. Any immunity enjoyed by individual foreign officials would come from common law.

What’s more, it should be noted that, given the wording of the various agreements, the OEF SOFA might encompass individuals deployed pursuant to ISAF (see Part I), but the reverse is probably not true. The OEF SOFA purports to
apply to: “United States military and civilian personnel of the United States Department of Defense who may be present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities.” This inclusive list of activities arguably covers OEF personnel, who were deployed on a counter-terrorism mission, and ISAF personnel, who were present in more of a civic assistance capacity.

3. Which Obligations Prevail?

Afghanistan has, in effect, accepted contradictory legal obligations: to cooperate with the Court by virtue of its ratification of the Rome Statute and to respect the domestic immunity of U.S. service members by virtue of its SOFAs and Article 98 Agreement. As the discussion in Part I reveals, this contradiction may be resolved by virtue of the timing of when Afghanistan accepted the relevant obligations. In the alternative, it could be argued that the SOFA constitutes a form of *lex specialis* that overrides any obligations that flow from Afghanistan’s ratification of the ICC Statute. By this theory, the general rule (the generalized delegation of territorial jurisdiction) would be trumped by a more specific rule (except with respect to persons covered by a valid SOFA).

Of course, the Court might also determine that it is Afghanistan itself that has created this dilemma by entering into agreements containing competing terms. This is a dilemma for Afghanistan to resolve or to accept the consequences of being in breach of one or another set of obligations. Article 98 has been designed to help reconcile some such situations by preventing the Court from asking a state to hand over a suspect if it has a pre-existing agreement to another state pledging not to do so.

4. What Exactly Did Afghanistan Relinquish?
There is also an argument that by virtue of the SOFAs and the Article 98 agreement, Afghanistan only relinquished a portion of its domestic jurisdiction. By agreeing not to prosecute U.S. servicemembers for crimes committed on its territory, it would be foregoing the exercise of adjudicative jurisdiction (by promising not to prosecute U.S. servicemembers in its courts) and enforcement jurisdiction (by promising not to transfer U.S. servicemembers found on its territory to the Court). (The SOFA also granted the United States the right to exercise its own enforcement jurisdiction on Afghan territory).

Afghanistan’s prescriptive jurisdiction, by contrast, remains intact. As such, Afghanistan’s domestic law continues to govern the conduct of U.S. forces even if it can no longer enforce that law in its domestic courts vis-à-vis U.S. servicemembers. By this theory, Afghanistan retained some portion of its domestic jurisdictional competency, which is could still delegate to the ICC. In its filing to the Pre-Trial Chamber seeking approval to open an investigation into the Afghanistan situation, the OTP takes this argument further and suggests that Afghanistan may have only given up its enforcement jurisdiction in the SOFA (footnote 47), thus leaving its prescriptive and adjudicative jurisdiction intact and able to be delegated to the ICC.

Another way of looking at it is that Afghanistan retained all its jurisdictional competencies, it simply agreed to refrain from exercising one or more of them in connection with a discrete class of potential defendants. This argument is further developed here, but the idea is that the SOFAs do not negate these jurisdictional competencies at all, but rather oblige Afghanistan not to exercise them. Because Afghanistan retained these competencies, it could still delegate them all to the Court upon ratifying the Rome Statute.

5. **Internationalized/Pooled Universal Jurisdiction**

Third, it should also be noted that the delegation theory is not the only theory explaining ICC jurisdiction. It has also been argued that the ICC is exercising a form of internationalized or pooled universal jurisdiction that does not depend
on an exercise of delegation by any particular state. All the crimes over which the Court has jurisdiction, with the potential exception of the newly-activated crime of aggression, are subject to universal jurisdiction under customary international law and/or treaty law. Individual criminal responsibility for these crimes is thus grounded in a precept of international law, as opposed to any specific articulation of domestic law. If any domestic court can exercise universal jurisdiction over international crimes, then so too should any international court independent and apart from any other basis of jurisdiction grounded in territoriality or nationality. In the words of one noted commentator, “This theory posits that the normative justification of punishment is independent of the will of the respective sovereign.” This alternative theory of ICC jurisdiction assumes, however, that just because the entire international community agrees on the criminality of certain conduct, it also accepts the validity of supra-national enforcement by the ICC, which is a membership organization.

In its filing to the Pre-Trial Chamber, the OTP alludes to this argument in noting the many multilateral treaty regimes devoted to international crimes that allow states to prosecute the nationals of states that are not parties to those treaties. The brief states:

such crimes attract universal opprobrium and thus demand repression by each of the members of the international community on behalf of the whole.

6. International Jurisdiction

Finally, there is the theory that the ICC members states have created an international court exercising a form of international jurisdiction without parallel in the domestic jurisdictional principles outlined above. At the moment, the ICC has 123 member states drawn from across the globe, which collectively have constituted an international organization with an international legal personality and which all other states—even non-members—will have to interact
with even if they do not have strict treaty-based duties towards that organization. Indeed, even organizations with fewer member states have been accorded international legal personality and juridical capacity as against non-members.

In a number of instances—such as with respect to domestic amnesty laws or pardons, which in some limited respects are akin to the domestic immunity granted by Afghanistan in the SOFAs—international courts (the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, respectively) have asserted special prerogatives to prosecute offenders that inure to them by virtue of their status as an autonomous international institution not bound by domestic legal arrangements or customary international law rules geared towards national institutions. The International Court of Justice in the Arrests Warrant Case (para. 61), for example, recognized that international institutions are not bound by immunities that might apply in domestic courts.

The OTP also makes reference to this concept in its filing, noting that states conferred jurisdiction to international judicial institutions at Nuremberg and Tokyo following World War II. The juridical basis for the two Tribunals remains somewhat unsettled. Some have argued that they were essentially occupation courts premised on the victorious Allies holding German sovereignty in trust. Under this view, the Allies were channeling German criminal jurisdiction when they prosecuted the Nazi leadership. Others have argued that the Nuremberg and Tokyo Tribunals were exercising a form of sui generis international jurisdiction not grounded in, or limited by, German domestic law. The fact that the Allies prosecuted crimes that did not find expression in German law—e.g., crimes against humanity and crimes against the peace—suggests that the two tribunals were unmoored from the local legal framework.

In any case, these last two theories are premised on the idea that the ICC’s jurisdiction is inherently international in nature—based upon the nature of the crimes in question—rather than a form of delegated domestic jurisdiction.
such, the ICC has an international law basis for exercising jurisdiction independent of other forms of state consent. This position is not without its detractors. As two commentators have argued:

There is no international law doctrine that would support either the existence or the manufacture of some generalized, inchoate prosecutorial and judicial right in the “international community” at large, separate and apart from that enjoyed by individual states.

Unlike other international tribunals that preceded it, the ICC has not yet confronted a challenge to its own jurisdiction (compétence de la compétence). (There was some thought that the case against Bosco Ntaganda would present such an opportunity as it was rumored that the defendant is a national of Rwanda, which is not party to the ICC Statute; at his preliminary hearing, however, Ntaganda pronounced himself a citizen of the Democratic Republic of Congo, which had ratified the treaty). It thus remains to be seen how the ICC interprets the nature of its own jurisdictional competency, particularly as against any operative SOFA that it could be argued purports to divest an ICC member state of territorial jurisdiction over alleged crimes that otherwise fall within the ICC’s jurisdiction.

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