[Exclusive: International Criminal Court Poised to Open Investigation into War Crimes in Afghanistan](http://foreignpolicy.com/2016/10/31/exclusive-international-criminal-court-poised-to-open-investigation-into-war-crimes-in-afghanistan/)

October 31, 2016

By [David Bosco](http://foreignpolicy.com/author/david-bosco)

Foreign Policy

http://foreignpolicy.com/2016/10/31/exclusive-international-criminal-court-poised-to-open-investigation-into-war-crimes-in-afghanistan/?utm\_source=Sailthru&utm\_medium=email&utm\_campaign=New%20Campaign&utm\_term=%2AEditors%20Picks

The prosecutor’s office of the International Criminal Court (ICC) is ready to initiate a full investigation of a range of possible war crimes and crimes against humanity in Afghanistan, including some by U.S. personnel, according to several knowledgeable sources. The ICC move would mark the first time that a formal ICC investigation has scrutinized U.S. actions and sets up a possible collision with Washington.

Multiple sources have indicated that the chief prosecutor, Fatou Bensouda, will seek to initiate an investigation in the coming weeks, likely after the U.S. presidential election but before the end of the year. U.S. officials visited The Hague recently to discuss the potential investigation and to express concerns about its scope.

The prosecutor’s office has repeatedly called attention to alleged abuses of detainees by U.S. personnel between 2003 and 2005 that it believes have not been adequately addressed by the United States. In a [report](https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf) last year, it noted that “crimes were allegedly committed with particular cruelty and in a manner that debased the basic human dignity of the victims.” Bensouda may also want to probe further the [attack](http://www.msf.org/en/topics/kunduz-hospital-airstrike) by U.S. forces on a Médecins Sans Frontières facility in Kunduz that killed several dozen people.

Even once an investigation begins, it is not clear that the prosecutor would ever bring charges against Americans. Doing so would require significantly more evidence than the prosecutor’s office currently possesses. The ICC normally does not interview witnesses, take testimony, or gather forensic evidence during its preliminary examinations, and that work would be just the beginning.

In order to charge Americans with war crimes, Bensouda would likely also have to demonstrate a link between the conflict in Afghanistan and U.S. detention policies, which may not be easy; the United States reportedly brought several detainees to Afghanistan from other parts of the world. Perhaps most controversial, the prosecutor’s office would have to determine that the United States has failed to address allegations of torture through its own domestic prosecutions, investigations, and reviews.

Moreover, any indictments related to Afghanistan would be months if not years away. Because no ICC member has referred the situation to the court, Bensouda will need the approval of a three-judge panel before launching an investigation. ICC judges have approved all three previous investigative requests from the prosecutor (in Kenya, Cote d’Ivoire, and Georgia), but their review can take several months, and the judges might request additional information before authorizing an investigation.

Still, the readiness of the prosecutor’s office to open an investigation represents a sharp setback for President Barack Obama’s administration, which has [sought](http://foreignpolicy.com/2014/12/03/the-war-over-u-s-war-crimes-in-afghanistan-is-heating-up-icc-hague/) several times to discourage an investigation in Afghanistan and even to avoid ICC mention of possible U.S. crimes. One former U.S. official familiar with the dialogue between the United States and the court described it as cordial, but said that prosecution officials appeared to have decided to include some U.S. activities in their investigation. “They would listen,” the official said, “but it was clear that minds were not being changed.”

The U.S. relationship with the court — which was hostile in the first George W. Bush administration — has become [increasingly friendly](http://www.nytimes.com/2013/04/03/world/europe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html) in recent years. Although U.S. legislation still prohibits direct financial assistance to the court, U.S. officials have facilitated the transfer of several indictees to the court and have sought to assist the ICC in other ways. A full investigation in Afghanistan would pose new complications for the next administration as it develops a policy toward the court. Early in her tenure as secretary of state, Hillary Clinton [expressed](https://www.theguardian.com/world/2009/aug/06/us-international-criminal-court) “great regret” that the United States was not able to join the court, but she has given no sign that she would support becoming a member.

At various points, the United States has insisted that the ICC lacks jurisdiction over U.S. personnel because Washington chose not to join the court. In 2002, a senior State Department official [warned](https://2001-2009.state.gov/p/us/rm/9949.htm) that ICC assertion of “jurisdiction over citizens of states that have not ratified the treaty … threatens U.S. sovereignty.” That view receives little support in the international legal community. “If an American can be prosecuted by a state for committing a crime on its territory, that state can delegate its territorial jurisdiction to an international tribunal,” Kevin Jon Heller, a law professor at SOAS, University of London, wrote in an email. “The US has never questioned such delegation — at least when applied to nationals of other states.”

The U.S. interpretation of the ICC’s legal reach became less clear during the Obama administration. Stephen Rapp, then-U.S. ambassador-at-large for war crimes issues, [said](http://foreignpolicy.com/2014/12/03/the-war-over-u-s-war-crimes-in-afghanistan-is-heating-up-icc-hague/) in 2014 that the ICC should not “as a policy matter” exercise jurisdiction over nonmember nationals, a formulation that suggested possible American acquiescence to the court’s legal authority. In [remarks](http://projects.iq.harvard.edu/tortureconference/home) to a Harvard University conference recently, Rapp, who has since left the government, said the U.S. argument about the ICC’s lack of jurisdiction is “wholly unpersuasive to those who would decide the issue.” But the question remains a contested one within the U.S. government, with the Pentagon being particularly concerned about allowing the precedent of U.S. legal exposure.

The move on Afghanistan would come as the court is [reeling](https://foreignpolicy.com/2016/10/26/is-the-international-criminal-court-crumbling-before-our-eyes-burundi-south-africa-gambia/) from the decision of several African states to leave, including South Africa. African officials have cited the failure of the ICC to launch investigations outside of Africa as one of their complaints, and an Afghanistan inquiry that includes scrutiny of the United States could influence that dynamic. There is no evidence, however, that the African departures have impacted Bensouda’s approach to Afghanistan.

Although the announcement of an investigation will discomfit Washington, the prosecutor’s office will likely devote most of its energy to prosecuting abuses by anti-government forces in Afghanistan, including the Taliban. The United Nations [estimates](http://www.un.org/apps/news/story.asp?NewsID=53229#.WBeo9ztqdg0) that more than 20,000 civilians have died in the country since 2009, the majority at the hands of insurgent forces. Investigating insurgent crimes and attempting to assign individual criminal responsibility for them will test the investigative capacity of the court.

These investigations could also present their own political problems. The Afghan government has viewed immunity as an important point of leverage in its efforts to broker cease-fires with opposition forces. In 2007, the Afghan parliament [enacted](http://www.washingtonpost.com/wp-dyn/content/article/2007/02/01/AR2007020100224_pf.html) legislation offering amnesty to fighters who laid down their arms. And this September, the government [inked](http://www.aljazeera.com/news/2016/09/afghanistan-ghani-hekmatyar-sign-peace-deal-160929092524754.html) an agreement with Islamist leader Gulbuddin Hekmatyar promising immunity for past political and military acts in exchange for an end to his activities against the government.

Moreover, past ICC reports on its preliminary examinations suggest that alleged abuses by the Afghan government itself will also receive scrutiny. In last year’s report, the prosecutor’s office described a range of alleged crimes by Afghan forces, including torture and mistreatment of thousands of detainees. Given these complications, Afghan officials may not welcome an investigation and may choose to provide only limited support to visiting ICC personnel.

When Bensouda finally does open her Afghanistan file, she will be launching one of the most difficult investigations the court has undertaken, both practically and politically. The court may be headed out of Africa, but it is moving toward very difficult terrain.