Will the ICC Launch a Full Investigation in Afghanistan?

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In mid-November, International Criminal Court prosecutor Fatou Bensouda announced that her office would make a decision “in the very near future” on whether to launch a full investigation in Afghanistan. That statement meshed with my own reporting that prosecutor’s office had finally chosen to move ahead.

For more than a decade, the ICC has maintained a preliminary examination of various alleged crimes in that country, mostly by the Taliban but also allegations of torture by U.S. personnel. In its latest update on the examination (published as Bensouda announced the imminency of a decision), the prosecutor’s office even expanded the enquiry into U.S. activities to cover potential torture at “black sites” in Lithuania, Poland, and Romania.

But we are now more than six months from Bensouda’s declaration, and there are no signs that the prosecutor will pull the trigger any time soon. So what happened? I checked in recently with Bensouda’s deputy, the Canadian lawyer James Stewart, and he communicated the following:

Our statement in last November’s [preliminary examination] activities report that a final decision on whether to seek judicial authorisation to open an investigation was imminent was accurate at that time (para. 230 of the activities report), but we also said in the report that the issue of admissibility of potential cases would be subject to further information that could be provided by the relevant national authorities in the course of the PE [and, we added, or any subsequent investigation] (para. 214).

We also noted the failure up to that time of the Government of Afghanistan to provide us with any information on national proceedings (paras. 217 and 226).

We stated as well that we were seeking to obtain further clarification on the scope of relevant preliminary reviews and investigations in the US before finalising a determination of admissibility of potential cases (para. 222).

Reading between these lines, the prosecutor’s office has a relatively simple, complementarity-based explanation for the delay: Bensouda’s signal that the court was ready to leap into Afghanistan prompted scurrying in Washington and Kabul to provide additional information on their domestic processes and (perhaps) convince the court that no investigation was needed, at least of their activities.

Assessing the validity of the decision to delay is hard without knowing what new information has been provided. From the U.S. side, it’s tough to imagine that the Trump administration has provided compelling evidence that it is examining U.S. torture policies at anything like the systemic level that the prosecutor seems to want. The Afghan side is murkier. There are indications that Afghanistan has draft legislation on ICC crimes and may be considering new moves, but an Afghan civil society delegation that visited the court in April (facilitated by the human rights group FIDH) saw little progress on accountability.

It’s tempting (if entirely speculative) to wonder if Trump’s ascendancy has prompted some rethinking in the prosecutor’s office about the suitability of this moment for picking a fight with Washington—and a fight would certainly result from the prosecutor’s first ever investigation of American conduct. There may also be more mundane budget and logistical issues at work. Moving to a full investigation requires substantial new investments of personnel and resources.

Whatever the factors influencing the prosecutor, the ongoing dance on the Afghanistan examination is a reminder that complementarity analyses have become a vital source of flexibility for the court. The prosecutor has very ample discretion about whether and when to move from a preliminary examination to a full investigation, and complementarity has in many contexts become the focal point for that discretion.