

By Laura Dickinson and Alex Whiting

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In November, the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, sought authorization from a panel of ICC judges to open an investigation into war crimes and crimes against humanity in Afghanistan in relation to the armed conflict there. This request is of particular significance to the United States. That's because although the bulk of the activity that is the subject of the request concerns the Taliban, along with some alleged conduct by Afghanistan government officials, the request also encompasses alleged crimes committed by U.S. military personnel and CIA officials. The time period covered by the request begins on May 1, 2003, for acts in Afghanistan, but includes alleged crimes committed earlier on the territory of other States Parties to the ICC (Lithuania, Poland, and Romania) with a nexus to the armed conflict in Afghanistan beginning on July 1, 2002.

The ICC Prosecutor had been conducting a preliminary examination of allegations of such crimes over the course of the last decade. The November 2017 request marks a significant turning point, though, because it reflects the Prosecutor's judgment that the allegations justified moving forward into a new, more formal phase of investigation. The Prosecutor cannot make that decision on her own, however. A Pre-trial Chamber of three judges must authorize the request because Afghanistan, though a state party to the ICC, did not invite the investigation.

Much has already been written about the potential impact that this request could have on the relationship between the ICC, U.S. allies who are parties to the ICC Statute, and the United States, who is not a party. (The United States, in a December, 2017 statement that Steve Pomper has [described as "Delphic,"](#) articulated a series of concerns regarding the Prosecutor's action.) And President Donald Trump's recent decision to name John Bolton as his new national security adviser [likely will have an impact on U.S. policy toward the ICC](#)

. Here, rather than delving into such policy questions, we would like to focus on a set of legal issues, in particular on the nature of the upcoming legal decision that the ICC panel will be making, and, if the panel approves the Prosecutor's request, what the substantive and procedural legal framework for an investigation would be moving forward as it might apply to the United States.

*Laura Dickinson: What was the legal standard applicable to Fatou Bensouda's request to the Pre-trial Chamber of the ICC, and what was the kind of evidence she relied upon to determine whether or not that standard was met?*

Alex Whiting: When a situation is referred to the ICC by a State Party or by the UN Security Council, the Prosecutor can commence an investigation without judicial approval. However, when the Prosecutor seeks to commence an investigation *proprio motu*, or on her own authority, an additional safeguard built into the Rome Statute requires her to obtain approval from the Pre-Trial Chamber.

Article 53 of the [Rome Statute](#) commands that the ICC Prosecutor “shall” initiate an investigation, and seek such approval to move forward, where there is a reasonable basis to believe that crimes within the jurisdiction of the court have been committed and all other statutory criteria are satisfied. In 2013, the Prosecutor issued a “[Policy Paper on Preliminary Examinations](#),” in which she detailed the process by which she will progress from a preliminary examination to an investigation. By statute, the decision requires an assessment of jurisdiction, admissibility, and the interests of justice.

Jurisdiction includes temporal jurisdiction (the alleged crimes must be committed after 1 July 2002, after the relevant State Party joined the ICC, or after the Security Council refers the situation to the ICC, whichever date is latest), subject matter jurisdiction (war crimes, crimes against humanity, and genocide), and territorial or personal jurisdiction (the alleged crimes must be committed on the territory of a State Party or by a national of a State Party or within a situation referred to the court by the U.N. Security Council).

Admissibility requires an assessment of both complementarity and gravity. Complementarity will foreclose an ICC investigation only if a national jurisdiction is genuinely investigating and prosecuting the alleged crimes, in particular with respect to those allegedly most responsible, the principal focus of the ICC.

Regarding gravity, the Prosecutor has [explained](#) that it “includes an assessment of the scale, nature, and manner of commission of the crimes, and their impact, bearing in mind the potential cases that would be likely to arise from an investigation of the situation.”

Finally, “interests of justice” is a countervailing consideration. As the Prosecutor has [explained](#) it, the “Office must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” In a 2007 “

[Policy Paper on the Interests of Justice](#)

,” the Prosecutor made clear that this factor is exceedingly narrow and does not include the consideration of how an investigation might affect ongoing or future peace processes.

*Laura Dickinson: How does the Prosecutor gather evidence in the preliminary examination phase?*

Alex Whiting: During the preliminary examination phase that precedes a formal investigation, the Prosecutor has no formal investigative powers and must therefore rely only on information that is publicly available or provided voluntarily by governments, international organizations, or non-governmental organizations. The Office of the Prosecutor will often specifically engage all interested governments during this process, providing information about where the Office stands and seeking all relevant information that might bear on the decision about whether to proceed to the investigation phase. The Prosecutor has [said](#) that:

The goal is to collect all relevant information necessary to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. If the Office is satisfied that all the criteria established by the Statute for this purpose are fulfilled, it has a legal duty to open an investigation into the situation.

*Laura Dickinson: What likely triggered the Prosecutor's decision to seek approval to commence a formal investigation?*

Alex Whiting: Although the Prosecutor recognizes that it is obligatory to commence an investigation when all the statutory criteria are met, the OTP can exercise some discretion over the timing of this step. Preliminary examinations have ranged in duration from a few days (Libya) to more than 10 years (Afghanistan). Situations that are referred to the court by a State Party or the Security Council will typically move through the preliminary examination phase more quickly than when the prosecutor proceeds *proprio motu*, on her own authority, as in the Afghanistan situation.

The preliminary examination phase in the Afghanistan situation has been particularly extended because the Prosecutor says that her office faced challenges in collecting and seeking to verify information in light of the security situation in Afghanistan and the limited cooperation of the countries and groups involved. Although the Prosecutor [says](#) that her office “has been in contact with relevant governments and stakeholders, including the Government of Afghanistan and the governments of ISAF troop contributing countries,” she has not provided details about these interactions. In addition, the Prosecutor has undoubtedly delayed moving on Afghanistan in order to prioritize other, more promising investigations. It is not clear what triggered a decision to seek permission to start an investigation now; she likely concluded that at some point the statute requires that an investigation be opened and that she had collected sufficient information to warrant moving forward. The Prosecutor’s request to open the Afghanistan investigation is largely based on publicly-available information. With respect to the allegations of torture by U.S. personnel, she primarily relies on reports of U.S. congressional investigations, in particular the Senate Select Committee on Intelligence Report on the Central Intelligence Agency’s Detention and Interrogation Program.

*Laura Dickinson: How was the Pre-trial Chamber formed and selected?*

Alex Whiting: Before filing her request to commence an investigation in Afghanistan, the Prosecutor informed the Presidency of the ICC that she intended to take this step, and in turn the president [selected](#) three judges from the Pre-Trial Chamber to consider the Prosecutor’s filing: Judges [Antoine Kesia-Mbe Mindua](#) (the Democratic Republic of the Congo), [Chang-ho Chung](#) (Korea), and [Raul C. Pangalangan](#) (Philippines). The judges then [elected](#) Judge Mindua to be the presiding judge of the chamber.

*Laura Dickinson: Under the ICC’s legal framework, victims of alleged crimes have the opportunity to submit “representations” to the pre-trial chamber. The pre-trial chamber set a deadline of Jan. 31, 2018 for these submissions, and on February 20, 2018, the Victim’s Participation and Representation Section of the ICC transmitted a final consolidated report of these victims’ representations to the ICC. What do these representations typically look like, and what is their significance?*

Alex Whiting: When the Prosecutor seeks to open an investigation, she is required to notify all potential victims who are then [provided an opportunity](#) through the Registry of the ICC to submit their views on the Prosecutor's request. The Registry has the responsibility to analyze the submissions and to provide to the Pre-Trial Chamber all those that are from persons or entities qualifying as victims under the ICC's definition in Rule 85 of the [Rules of Procedure and Evidence](#) :

For the purposes of the Statute and the Rules of Procedure and Evidence: (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

In addition, the identification of potential victims at this stage commences the process of providing those victims with representatives who can then participate in all further proceedings regarding the situation and investigation.

*Laura Dickinson: What is the legal standard or standards that the Pre-trial Chamber will apply in making its decision on the Prosecutor's application to open an investigation?*

Alex Whiting: Pursuant to Article 15(4) of the Rome Statute, the Pre-Trial Chamber "shall" authorize an investigation if it finds that there is a reasonable basis to proceed with an investigation after considering the same factors addressed by the Prosecutor, namely jurisdiction, admissibility, and the interests of justice. It is worth noting that at this stage the Pre-Trial Chamber makes these determinations with respect only to the situation as a whole, not necessarily with respect to each potential case within the situation. As long as the legal requirements are satisfied by some potential cases within the situation, that is sufficient to authorize an investigation. Therefore, if there exist possible jurisdictional or admissibility challenges to *particular* potential cases within a situation, for example with respect to potential cases against U.S. citizens, the Pre-Trial Chamber need not necessarily resolve them at this stage, though there is no reason to believe that it could not resolve them if they were put before the court.

*Laura Dickinson: What kinds of evidence or materials or arguments will the Pre-trial Chamber rely on to make its decision? How will it obtain such evidence, materials or arguments?*

Alex Whiting: The Pre-Trial Chamber relies on the information provided by the Prosecutor but may request additional information from the Prosecutor. In connection with the Afghanistan request, the Pre-Trial Chamber has made two such requests to the Prosecutor.

*Laura Dickinson: Who will present this evidence or arguments? Does the United States have an opportunity to present arguments to the pre-trial chamber at this point in the proceedings? What about Afghanistan or other states parties implicated in the request?*

Alex Whiting: The evidence and arguments are presented to the Pre-Trial Chamber by the Prosecutor, in writing. Pursuant to Article 18 of the Rome Statute, at the time of seeking a request to commence an investigation, the Prosecutor has an obligation to notify any state that might be exercising jurisdiction over the alleged crimes of its request – in this case including the United States and Afghanistan – and those states have thirty days to provide information that it is investigating and prosecuting the same crimes identified by the Prosecutor. If there is such a notification, the Prosecutor must defer to the state unless the Pre-Trial Chamber decides to authorize the investigation nonetheless, upon further application by the Prosecutor. A state may appeal such a decision to the Appeals Chamber of the ICC on an expedited basis. In the event the Prosecutor defers to a state's investigations, she is required to review the progress of the state's inquiries at least every six months.

*Laura Dickinson: Could the United States make any other legal argument at this stage, for example about jurisdiction? What about Afghanistan? Or other states or amici?*

The Statute expressly permits states to weigh in at this stage only on the narrow issue of whether it is investigating and prosecuting the same persons for the same potential crimes, and does not authorize the submission of views on any other aspect of the Prosecutor's application to commence an investigation, such as jurisdiction. However, Rule 103 of the [Rules of Procedure and Evidence](#)

provides that “[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.” A state seeking to make observations as an amicus would need to seek leave of the Chamber first before doing so. Presumably, as a show of deference, the Pre-trial Chamber

would permit any state implicated by the proceedings, such as the U.S., to submit its observations at any stage of the proceedings on any matter.

*Laura Dickinson: How much evidence is typically necessary to satisfy the “reasonable basis” standard? In other cases, what has the court required?*

Alex Whiting: In the context of the [request](#) to open an investigation in Côte d’Ivoire, the Pre-Trial Chamber had this to say about the “reasonable basis” test:

This test of “reasonable basis to believe” is the lowest evidential standard provided by the Statute. Thus, the information available to the Prosecutor is not expected to be “comprehensive” or “conclusive”, which contrasts with the position once the evidence has been gathered during the investigation. In evaluating the information provided by the Prosecutor and the victims, the Chamber must be satisfied that a sensible or reasonable justification exists for the belief that a crime falling within the jurisdiction of the Court “has been or is being committed.”

The Prosecutor has relied on his or her own authority to open investigations in Kenya, Côte d’Ivoire, and Georgia. The Pre-Trial Chamber has never refused a request from the Prosecutor. Further, the authorization does not ordinarily limit the scope of the Prosecutor’s investigation, except perhaps temporally. The alleged crimes that the Prosecutor puts forward in her request to commence an investigation are meant only to be illustrative; once the investigation is authorized, she has the authority to investigate any crimes that fall within her jurisdiction within the situation. Typically, however, the Prosecutor has focused on the alleged crimes that were the focus of the request to commence an investigation.

*Laura Dickinson: Article 15 states that the Pre-trial Chamber will make a decision on jurisdiction at this stage. Is this implicit or will it typically make an explicit decision regarding its jurisdiction? Has the Pre-Trial Chamber ever considered jurisdictional arguments from states at this stage?*

Alex Whiting: In decisions authorizing investigations, the Pre-Trial Chamber explicitly addresses all of the criteria addressed by the Prosecutor, namely jurisdiction, admissibility, and

interests of justice. In the context of an investigation commenced *proprio motu*, or on the Prosecutor's own authority, the Pre-trial Chamber has not been confronted by an argument that it might lack jurisdiction over one class of persons within a situation. Presumably if the U.S. could persuade the Pre-trial Chamber that the ICC lacks jurisdiction over U.S. personnel in Afghanistan, for whatever reason, the Pre-trial Chamber could exclude this part of the situation from its authorization decision. The Office of the Prosecutor could then appeal such a decision to the Appeals Chamber. Note that although the Prosecutor filed her request to investigate in Afghanistan in November, the U.S. has not sought an opportunity to present its views to the Pre-trial Chamber with respect to jurisdiction, or admissibility.

*Laura Dickinson: How long will it likely take for the Pre-trial Chamber to issue its decision? What is the court's track record in other cases at this stage?*

Alex Whiting: It's hard to say for certain but it usually takes several months. Most people seem to think that the decision will come out by the end of March because the addition of new judges to the court this month means that there is a reshuffling of judges among the Appeals, Trial, and Pre-Trial Chambers so there is some sense that the judges are seeking to wrap up pending work. But it could take longer.

*Laura Dickinson: How likely, in your opinion, is it that the Pre-trial Chamber will grant the request to open an investigation?*

Alex Whiting: It is absolutely certain that the Pre-Trial Chamber will authorize the investigation. Given the low standard at this stage and how it has been applied in the past, the Pre-Trial Chamber here will authorize the Afghanistan investigation.

*Laura Dickinson: Can the U.N. Security Council stop an ICC investigation or prosecution?*

Alex Whiting: Yes, but only for a year at a time. Pursuant to Article 16 of the Rome Statute, the Security Council can adopt a resolution under Chapter VII of the U.N. Charter to suspend an ICC investigation or prosecution for 12 months, renewable at the end of each year. Presumably, such a resolution would suspend the entire Afghanistan investigation, not just parts of it. Although both Sudan and Kenya sought to persuade the Security Council to adopt an Article 16 resolution to block the ICC in their respective countries, the Security Council has



never resorted to this measure.

*Laura Dickinson: If the Pre-trial Chamber does authorize an investigation, what happens after that?*

Alex Whiting: The Prosecutor will then commence the investigation and will have resort to all of the investigative powers in Part 9 of the Rome Statute. In sum, these powers require States Parties to comply with requests for information from the Prosecutor's office. Since it is not a State Party, the U.S. has no legal obligation to comply with the Court's requests. Moreover, the [American Service-members' Protection Act \(ASPA\)](#) prohibits any U.S. cooperation with ICC investigations, with certain narrow exceptions not applicable here.

Afghanistan is a State Party and thus does have a legal duty. The difficulty, however, is that it is a legal obligation that is difficult to enforce. Where there is a failure to comply, the Prosecution can ask the judges to make a finding and refer the matter to the Assembly of States Parties (ASP) of the ICC, but that body is comprised of 123 States Parties and is ill-designed to act collectively, and individual states have not in the past been motivated to use diplomatic or political tools to enforce cooperation with the court. The lack of sustained political support for the work of the Court, which is dependent on the cooperation of states to advance its work, has been one of the central challenges facing the ICC.

*Laura Dickinson: How will the Prosecutor decide where to focus the investigation?*

Alex Whiting: In September 2016, the Prosecutor issued her "[Policy Paper on Case Selection and Prioritization](#)" in which she detailed the strategic and operational factors that will guide her decisions on how to prioritize investigations and prosecutions. In principle, the Office will focus on the gravest crimes within a situation and will consider too the ability to obtain reliable evidence and the appearance of suspects before the court. In this [essay](#), I wrote about how the Prosecutor could rely on this policy to focus first in crimes allegedly committed by the Taliban and Afghan government forces in Afghanistan.

*Laura Dickinson: How long do such investigations typically take?*

Alex Whiting: The court's investigations have varied dramatically in length, but there are three reasons to expect that the Afghanistan investigation will take a very long time, likely years. First, Bensouda announced when she became Prosecutor that she would focus on ensuring that cases were thoroughly investigated, essentially [trial-ready](#), before being brought. As a result, investigations under this Prosecutor have lasted significantly longer than under the first Prosecutor. Second, this case is particularly challenging because none of the entities that will be investigated – the Afghan government, the Taliban, or the U.S. – will likely cooperate with the investigation. Third, the situations under investigation have piled up at the ICC but resources have not expanded significantly and so the OTP finds itself stretched very thin. Therefore, it is likely that the Prosecutor will not be able to assign this case the kinds of resources the case requires.

*Laura Dickinson: How will the Prosecutor gather evidence?*

Alex Whiting: As noted above, the Prosecutor can make requests for information that are legally binding on States-Parties but she lacks much effective recourse if those States ignore or fail fully to comply with the requests. However, it is important to note here that evidence can and does travel, including across borders. The Prosecution will have little to no access to evidence that is located in Afghanistan or the U.S., and for this reason will look for witnesses, documents, and other kinds of evidence that have left those countries and can be accessed elsewhere.

*Laura Dickinson: At what point during an investigation can a state whose nationals may be implicated in a case, but who have not been named as defendants in a particular case, make arguments to the Court about issues such as jurisdiction and admissibility?*

Alex Whiting: Once actual cases are brought against individual defendants, a state that has jurisdiction over the alleged crimes can challenge the admissibility of the cases pursuant to Article 19 of the Rome Statute by presenting information that it is investigating or prosecuting the same conduct by the same person. The government of Kenya unsuccessfully made such a challenge in the cases against six Kenyan leaders in 2010. There is no express provision for states to challenge the court's jurisdiction, however, and no state has ever tried to mount such a challenge (though individual defendants have). A state is ordinarily permitted just one opportunity to challenge admissibility and must do so before trial, unless it can show

exceptional circumstances warranting either a second challenge or one during trial. If a challenge is permitted after the commencement of trial, it may be made only on the basis that the defendant has *already* been tried for the same conduct by a national jurisdiction. Individual defendants can challenge both admissibility and the court's jurisdiction but are subject to the same limitations of bringing one challenge before the commencement of trial unless exceptional circumstances can be shown.

*Laura Dickinson: Can a state waive such arguments by failing to make them at a particular stage?*

Alex Whiting: Following the Prosecutor's request to commence an investigation, a state has 30 days to challenge admissibility and presumably then waives such a challenge if not made within that time frame, until such time as the Prosecutor brings individual cases, at which point the state can challenge admissibility with respect to any particular case. The statute requires the state to make such case challenges "at the earliest opportunity" and in any case before trial, absent exceptional circumstances.

*Laura Dickinson: What is the standard for determining whether a case may be opened against a particular individual defendant or defendants, and who makes that decision?*

Alex Whiting: At any point once the investigation has commenced, the Prosecutor may seek to bring charges against individual defendants by seeking an arrest warrant or summons. In the past, the Prosecutor has obtained arrest warrants both publicly and under seal. Article 58 of the Rome Statute requires the Pre-Trial Chamber to issue an arrest warrant to summons upon a showing by the Prosecutor of reasonable grounds to believe that the individual has committed crimes within the jurisdiction of the court. The standard is similar to that required to open an investigation, but it is particularized now to the actions of a specific individual. Because of this focus and the stakes of commencing a case at the ICC, the judges will be looking for more compelling evidence than might be sufficient at the investigation commencement stage. When the Court issues an arrest warrant, all States Parties are obligated to assist in the arrest of the accused individual. For this reason, it is likely that lawyers for those persons potentially implicated in the ordering, sanctioning or commission of alleged torture in Afghanistan, or one of the black sites in Lithuania, Poland, or Romania (which also fall within the Prosecutor's request), will likely be soon be advising their clients not to travel to the 123 States Parties that are members of the court. Just in case.