

Crimes in Afghanistan: Fatou Bensouda's Investigative Mission

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Global Research, March 08, 2020

Region: [Asia](#), [USA](#)

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It seemed an unlikely prospect. The International Criminal Court has tended to find itself accused of chasing up the inhumane rogues of Africa rather than those from any other continent. It has also been accused of having an overly burdensome machinery and lethargy [more caught up with procedure than substance](#). Critics fearing a behemoth snatching soldiers from the armed forces of various states could rest easy, at least in part.

Law tends to be a manifestation of power and international law, in particular, tends to be a manifestation of consensus. And the powerful rarely give their consent in matters of trying crimes against humanity when it comes to their own citizens. Qualifications and exemptions abound, often cited with a certain sneer.

This explains the sheer fury and curiosity caused by [the decision](#) of the ICC's Appeals Chamber on March 5 authorising Chief Prosecutor Fatou Bensouda to proceed with an investigation into alleged crimes committed in Afghanistan from 2003. The interest was not merely in the commission of crimes by any one force: the Taliban and various "armed groups", members of the Afghan armed forces and "alleged crimes by the US Forces and the CIA" featured. But the actions of US and Afghan forces was bound to arouse much interest, given a [UN report alleging](#) more killings in the first three months of 2019 than attributed to the Taliban. (The figures, respectively, were 227 civilians killed by insurgent groups and 305 deaths caused by Afghan and international forces.)

The initial decision of the Pre-Trial Chamber II (April 12 2019) had gone against the Prosecutor's efforts that had commenced in November 2017. While the pre-trial chamber accepted that the brief established a reasonable basis to consider crimes that fell within the jurisdiction of the ICC, time had elapsed since the preliminary examination in 2006 and the evolving political scene in Afghanistan.

As ever, the jurisdiction of war crimes and crimes against humanity is a political thing: to authorise such an investigation, in the words of the 2019 [media release](#), would have diverted "valuable resources prioritizing activities that would have better chances to succeed." Nor had cooperation with the Prosecutor been forthcoming in Afghanistan itself. It was a decision that caused a fair share of consternation among human rights critics and activists. One question kept being asked: Had the ICC folded before pressure from the Trump administration?

The argument of pressure was a hard one to dispel. In 2019, the Trump administration

[announced](#) that it would revoke or deny visas to any members of the ICC connected with investigating alleged war crimes by US personnel in Afghanistan. That body, charged US Secretary of State Mike Pompeo, was “attacking America’s rule of law,” an interesting formulation suggesting how partial that rule can be for a certain country.

Despite this backdrop of intimidation, the Appeals Chamber had a change of heart. According to presiding judge Piotr Hofmański, “The prosecutor is authorised to commence an investigation into alleged crimes committed on the territory of Afghanistan since May 1, 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan.” The pre-trial chamber had erred in identifying “additional considerations” as to whether the prosecutor could proceed with the investigation. It was not for the body to consider “the interests of justice” as part of that authorisation, merely whether there was “a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether potential cases(s) arising from such an investigation appear to fall within the Court’s jurisdiction.”

Pompeo was sufficiently incensed by the decision [to call the ruling](#) a “truly breathtaking action by an unaccountable, political institution masquerading as a legal body.” He also had the prospects of peace on his mind, considering the ruling disruptive given that it came “just days after the United States signed a historic peace deal on Afghanistan.”

Resistance against the ICC from the United States is far from new. Henry Kissinger [feared it](#), and said so, suggesting it would preside in thuggish majesty and impunity citing universal jurisdiction as its basis of operation. His views were rebuked by former Nuremberg war crimes prosecutor Benjamin B. Ferencz. “The innocent,” [he remarked](#) pointedly, “need not fear the rule of law.”

But fear and loathing for the ICC has been a recurrent theme. In 2018, then national security adviser John R. Bolton, famed for his opposition to international institutions, [insisted](#) that the US would not “cooperate with the ICC. We will provide no assistance to the ICC. And we certainly will not join the ICC. We let the ICC die on its own.”

Such a view sits in that particularly odd canon of US political thinking that dismisses aspects of international law – notably those involving breaches of human rights – as matters of convenience and sentiment. Such a view holds that Washington’s enemies deserve trial and punishment at the hands of international law; alleged offences by US forces should be a matter of US jurisdiction.

It also bucks the idea [put forth](#) by US prosecutor Robert H. Jackson at the Nuremberg war crimes trials in November 1945 that international tribunals are not products “of abstract speculations nor ... created to vindicate legalistic theories.” Jackson’s enunciated views would see US officials participate, extensively, in the creation of tribunals in the Balkans and Rwanda. Indeed, as Ferencz observed in 2001, numerous former presidents of the American Society of International Law and the American Bar Association acknowledged that “it would be in the best interests of the United States and its military personnel of the United States to accept” such a body.

While it is hard to see the US surrendering any soldiers for trial before judges of the ICC, the very acceptance that it has jurisdiction to investigate alleged crimes committed by such personnel enlarges its traditional and cautious scope. International law has seen a turn up for the books.

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