The International Criminal Court crashes and burns over Afghanistan

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In a classic 1970s television commercial, a greasy mechanic rolled out from under a car holding a $200 bearing that needed replacing and a $4 oil filter that would have prevented the problem if installed earlier. The mechanic delivered a prophetic line: “You can pay me now, or you can pay me later.”

The International Criminal Court in The Hague has learned that lesson the hard way, paying the higher price now because it did not pay a more reasonable price 20 years ago. The reckoning came last week when a three-judge pretrial chamber of the court told the prosecutor that she could not go forward with her inquiry into possible war crimes by Americans and others in Afghanistan. The judges concluded that the lack of cooperation in any investigation by the U.S. and others meant that there was a low prospect of obtaining any convictions and it was not in the interests of justice to go forward.

The decision prompted an outcry from human rights activists and surely disappointed the prosecutor. Most believed that this was the moment to bring Americans before the court for the first time and hold them accountable for alleged war crimes in Afghanistan. As Katherine Gallagher, an attorney for the Center for Constitutional Rights in New York put it: “With its decision today, the International Criminal Court sends a dangerous message: that bullying wins and that the powerful won’t be held to account.”

However, I find some other messages in the court’s decision. First, by failing to build a court with a broader membership and wider consensus in the first place (you can pay me now), it was inevitable that powerful nonmember states would become a problem at some point (you can pay me later). In the negotiations leading up to the creation of the court in 1998, the U.S. had been an active participant and likely supporter. However, late in the process, a coalition of human rights groups and small- and medium-sized “like-minded” nations decided to take the court in a more radical direction in order to create a court “worth having.”

Over the objection of the U.S. and several world powers, the coalition decided the court needed an independent prosecutor, the ability to bring charges against citizens of nonmember states, and the addition of a new and undefined crime of aggression. It was a hardball move, and the U.S. refused to join the court under those terms. In fact, many of the world powers did not sign on, and the court was weakened at birth. Now the court is paying because the U.S. continued to fight charges against its citizens, namely U.S. soldiers and operatives in Afghanistan.

The second message underscored here is that international law is not law in the way that ordinary people would understand it. There is no global constitution or true world court, the ICC has no police force to enforce its laws. International law is best understood as a set of norms that nations agree to, and even then they may violate them later when it is in their interests. International law is really driven more by power politics and agreements than by pure law.

Finally, this decision demonstrates once again the ineffectiveness of the International Criminal Court itself. I wrote an [article](https://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#4f15b9762405) five years ago titled “International Criminal Court: 12 Years, $1 Billion, 2 Convictions.” The record hasn’t improved much since then. If the supporters of the court were willing to take on the U.S. in forming the court, then they should have been ready to continue the battle today. Instead, when the Trump administration said it would not cooperate with the court and, indeed, would bar travel in the U.S. by court officials and take other preventive actions, the court effectively backed down.

Already weakened by a poor record of accomplishment, the court’s decision to back down over Afghanistan may be the beginning of the end for the ICC.