Deconstructing the Int’l Criminal Court’s Decision on Afghanistan

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The decision of the International Criminal Court’s Pre-Trial Chamber II refusing to open an investigation into crimes committed in Afghanistan establishes a new Rome Statute rule: there will be no investigations against suspects when they have enough raw political power to affect States Parties’ cooperation with the Court.

There are three main problems with the decision and this outcome:

1) The concept of “interests of justice” adopted by the Chamber covers up the impunity provided to those involved in the crimes. The Chamber recognized that war crimes and crimes against humanity were committed in Afghanistan and that there were no judicial investigations of such crimes. As a consequence, the Afghanistan situation is firmly under the jurisdiction of the ICC.

The U.S. Senate has reached a similar conclusion in acknowledging the practice of torture by U.S. personnel, and then the Obama administration made the decision not to prosecute those responsible for such crimes.

The issue should be identified properly. The modalities of the crimes committed by U.S. personnel during the War on Terror in Afghanistan, the active role of the United States in protecting the suspected perpetrators, and the subsequent Chamber evaluation that the State Parties to the Rome Statute are not cooperating and will not cooperate with an investigation in Afghanistan should not be concealed by a discussion about the efficiency or legitimacy of the ICC.

2) The Chamber encroached on the Office of the Prosecutor’s responsibilities for independently managing its own budget. “Authorizing the investigation would, therefore, result in the Prosecution having to reallocate its financial and human resources,” the Chamber stated. The Rome Statute guarantees the full authority of the Prosecutor and the independence of her Office, and it is the Prosecutor who decided to allocate part of her office’s resources to investigate the Afghanistan situation. The Chambers can review the decision to open a proprio motu investigation, but they have no authority to make a judgment on the allocation of the resources of the Office of the Prosecutor.

3) The Chamber established a new selection criterion: the prospect of “feasibility.” Such criterion can be found nowhere in the Statute. The Chamber has set forth that “interests of justice” is an obstacle to open an “investigation not feasible and inevitably doomed to failure,” and that investigations must focus on crimes that “appear to have more realistic prospects to lead to trials and thus effectively foster the interests of justice.“

The Chamber thus established a test based on a forecast of the willingness of the relevant states to cooperate. The Chamber’s forecast was totally subjective, and it did not expose any specific lack of cooperation in the Afghanistan situation. The Chamber even failed to mention the fact that [34 states parties](https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2019_03/20190305_2019-03-RSM-Placemat.pdf) contributed troops to the International Security Assistance Force (ISAF) in Afghanistan and, as a consequence, could provide information to the Prosecutor.

The Chamber also ignored that most ICC investigations could also be previously considered “not feasible.”  The arrest warrants issued in 2009 and 2010 against then-President of Sudan Omar al-Bashir are examples of the possibility of carrying out “not feasible” investigations.

It took 10 years, but Bashir was removed from power, and his imprisonment in Sudan exposes the value of the Court’s intervention even without an ICC trial. The ICC’s arrest warrants in the case of Sudan made clear the type of crimes suffered by the victims in Darfur, including genocide. They also constrained Bashir’s power, and he became a fugitive President. Amid his ouster, the [discussion](http://english.ahram.org.eg/News/329650.aspx) about selecting a new leader in Sudan has included that he should be “someone not wanted by the International ‎Criminal Court.”

The relevance of the Rome Statute should not be measured by the number of trials. More fundamentally, the Rome Statute specifies a different legal solution for the lack of cooperation of the State Parties. Article 87(7) of the Rome Statute establishes: “Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties.” The refusal to cooperate is a matter to be resolved by the States Parties, and it is not a selection criterion. The Chamber is ignoring the specific legal text.

Finally, I want to focus on the consequences of the new rule proposed by the Chamber. Simply put, the Judges are providing impunity to suspects who can exercise enough political power to affect relevant state parties’ cooperation with the Court. The Chamber stated that “changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future.” The Chamber thus transformed a political consideration into a legal requirement.

The ICC’s Judge Bertram Schmitt recently said in a compelling set of [remarks](https://www.justsecurity.org/62577/icc-judge-schmitt-counsels-resilience-preserve-international-justice/): “The Court is not meant to be a comfort zone. It must remain a staunch defender of those principles enshrined in the Rome Statute and not try to be complacent in reaction to the current international political climate.” What should be expected from the Judges is a faithful application of the Statute and a respect for the limits of the Chamber’s own authority.

The Rome Statute is an international legal system, and the Court is the face of the system. But its strength — and at the same time its eventual weakness — is the commitment of the States Parties “to guarantee lasting respect for and the enforcement of international justice.”

What should now be up for debate is the current State Parties’ commitment and the relevance they afford to international law in preventing and punishing the most serious crimes, including the role of U.S. citizens in the commission of crimes in Afghanistan and in the cover-up of those responsible.