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Not just another ‘crisis’: Could the blocking of the Afghanistan investigation spell the end of the ICC? (Part II)

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By Sergey
Vasiliev

April 20, 2019

Part II of this post addresses the larger implications of the PTC’s decision. For part I discussing its treatment of the ‘interests of justice’, see [here](#).

Justice and pragmatism

In my previous post, I argued that, as a result of the Pre-Trial Chamber’s incorrect interpretation of the ‘interests of justice’ standard, extra-legal considerations controlled the outcome of its determination. This part shows why this is problematic in terms of the legitimacy of the Court and of the broader project it symbolizes.



But first, is there no silver lining and nothing to defend in the PTC’s decision to deny authorization of the investigation in Afghanistan? As noted [elsewhere](#), the ‘crises’ in international criminal justice tend to consolidate members of the epistemic and support communities around the institutions while also bringing the existing ideological and other fault lines into sharper relief. There is no uniform consensus on the PTC decision either.

Some (mostly US-based) commentators suggest that the PTC’s decision on the Afghanistan probe was overdetermined, understandable, and thus, in a way, justifiable. After all, it was a well-known fact—even prior to the unequivocal statements by John Bolton in September 2018 and Mike Pompeo in March 2019—that the US would not tolerate the prospect of the ICC Prosecutor investigating the conduct of its armed forces and CIA personnel. Most recently, the US government’s hostility towards the Court took the form of overt pressure and visa restrictions meant to dissuade the ICC staff from (and punish it for) pursuing that course of action. The judges’ blocking the investigation is not merely caving to pressure, the argument goes, but it is ‘caving to reality’: a prudent step towards de-escalation and much-needed institutional adjustment (see [Bosco](#) and [Buchwald](#)). This is what the triumph of pragmatism over the idealistic and over-reaching attempts to bring accountability for the alleged crimes in Afghanistan looks like. It is warranted by the need for the Court to better prioritize its work, focus on the more tangible goals, and direct its scarce resources to situations ‘where there exists

some meaningful prospect of success' (Whiting). This makes sense, particularly considering the Court's poor track record in terms of securing convictions over the past years in situations seemingly less complex than that of Afghanistan.

It may well be that the Afghanistan investigation would not have led to prosecutorial success or even any cases at all. There is also no doubt that the opening of the investigation would have led to further escalation with the US and seriously complicated the situation for the Court and for its employees. It is also highly likely that the Prosecutor would continue facing serious difficulties obtaining cooperation of the relevant actors in the situation – the factor of some pertinence to the interests of justice. That said, this remains an assumption – and a questionable one at that when it comes to the investigation of the Taliban crimes.

The realist arguments are not patently misconceived or groundless (or at least, not all of them). The problem is that, even assuming *arguendo* that those concerns may be considered as validly falling within the 'interests of justice' (which they arguably may not), they are still hard to accept from a normative and legal policy angles. Importantly, as already noted in the debates, the non-authorization of the Afghanistan investigation effectively rewards non-cooperation and political pressure by states. Furthermore, while it might be more appropriate for those considerations to inform the discretionary decisions of the Prosecutor, it is disconcerting to see their trickling into the key paragraphs of the PTC Decision (paras 91-95). As the more diplomatic Alex Whiting put it, '[t]he ICC judges grappled with these realities more openly than we're often accustomed'.

The implications of this are consequential and problematic.

The decision creates a distinct impression that the judges have succumbed to political pressure. Given the quality of reasoning and the charged context in which the decision was delivered, it might give rise to speculations about the political motives underlying the outcome. What else could a reasonable observer conclude when connecting the dots? To begin with, consider the inordinate and unprecedented amount of time it took the judges to consider the matter and to render this poorly-reasoned and badly-written decision: first four months before Pre-Trial Chamber III and, following its 'curious' dissolution and the reassignment of the situation to the newly-constituted bench in March 2018, an additional 14 months before PTC II. These irregularities have befallen the situation involving a major power which was not only vocal in its opposition to the investigation, but also went as far as to bully the Court and take punitive measures against its personnel. Moreover, difficulties in securing cooperation were also expected on other situations, where judicial authorization to investigate was nonetheless given (Georgia and Burundi).

The ICC's Barayagwiza moment

Confrontations with recalcitrant states which refuse cooperation and render judicial functioning unfeasible are far from a novel situation for international criminal courts. In this connection, the *Barayagwiza* case comes to mind. In that case, the ICTR Appeals Chamber's dismissed an indictment with prejudice to the Prosecutor and ordered the release of a defendant due to human rights violations. Following that, Rwanda ceased cooperating with the ICTR and, in a move that was perceived necessary yet was no less embarrassing for that, the Appeals Chamber urgently reconsidered the decision on the pretext of 'new facts'. The tribunal watchers moved on since, but this episode was neither forgotten nor forgiven – the ICTR's reputation and legacy remained tarnished.

The Afghanistan non-investigation decision may be the ICC's first most obvious *Barayagwiza* moment. Except the legitimacy costs of being seen bending to politics are by far higher for the permanent Court two decades down the line than they were for an early specimen of *ad hoc* justice focusing on a single situation. Just like the ICTR Appeals Chamber twenty years ago, PTC II must have felt there was simply no other way than to surrender to the political realities. '*Fiat iustitia, et pereat mundus*' is easier said than done and between the law and pragmatism something got to give. However, by *normatively* accepting the inexorable *practical* and *political* constraints on their authority, the judges committed what Mettraux aptly called a 'judicial suicide'. They did not have to do that though, nor need the world perish, because there *was* the other way. Instead of throwing the whole investigation overboard lest the US would remain displeased, the judges should have granted the request, leaving it to the Prosecutor to decide whether and when parts of it should be pursued or de-prioritized (as noted also by Whiting and de Vos).

It is possibly true that the US pressure and anticipated escalation were not the sole determinants; it is more complex and the ruling should be seen in a broader context. That said, the likely gains such as prosecutorial success, effective expenditure, etc. are not all there is to it either. The issue of the legitimacy of the ICC in the longer term is also at stake. The 'reality' is not what the Court is meant to accept; it is something that is shaped by the relevant actors, including the Court itself, even though to a limited degree. The ICC's giving up on that opportunity of influence and reducing itself to the function of mere adjustment to that 'reality' is an abdication of its mandate. So much for the #justicematters hashtag the ICC uses to promote itself on the social media.

Afghanistan is exactly the kind of situations for which the ICC was created; it was the Court's legitimacy test case. If the ICC had only been capable of approaching this situation in the same way as it would any other situation not overshadowed by the US' involvement, it would have already vindicated itself and, in a symbolic yet important sense, 'succeeded'. By not even trying, it fell victim to its own misguided politics, giving its self-professed foes a reason to celebrate (see reactions by the White House, Bolton, and Netanyahu). The ICC support community should muster the courage to acknowledge that in the moment of truth the Court did not rise to the occasion.

This should trigger a much-needed candid conversation on its independence as a judicial institution and the integrity of the Rome Statute system as whole. Regardless, the damage has been done and legitimacy costs will be high. Repairing that damage might take decades and the Afghanistan decision will come to haunt the Court in other situations. It will also have broader implications for the project the ICC symbolizes. The ruling will not only fuel the general public's scepticism about international criminal justice but possibly also lead states in the Global South, civil society actors, and individuals working on international criminal and transitional justice issues to reappraise their commitment to, and any future engagement with, the project.

Where to from here? The end of faith

“Is this the end of the ICC as we know it?” and “Is it worth saving?”, are just some of the questions in the wake of the Afghanistan ruling. The institution will most definitely stay on. It has shown its occasional utility to the powers-that-be and also the resilience and flexibility, that are requisite for survival. But if one speaks of the ICC as the Court meant to deliver ‘justice for all’ and ‘speak truth to power’—the idea(l) which has held public imagination at least since 1998—it has proven unsustainable and disembodied from the actual institution.

Before the ICC supporters reel from their disappointment sufficiently to start brainstorming how the Court could be restored back to ‘factory settings’, they ought to linger for a moment to fully comprehend (and mourn?) what has happened. It is not possible to explain the Afghanistan non-investigation away as a one-off misstep, part of the maturing process, or a lesson to learn for the future – and move on as if nothing happened. The PTC decision has highlighted the (inherent) limits for the ICC as an institution occupying a certain niche in the global power politics, as an actor which—at least for now—is not only structurally unable to challenge major powers but also unwilling to just displease them. This amplifies the critical voices which question the emancipatory ambitions and impacts of international criminal justice. Those critiques ring truer and resonate more strongly than ever before.

The ICC will get further chances to redeem itself, the next serious test being the situation in Palestine. Nevertheless, the ICC's historiographers will likely be using the Afghanistan decision as a sort of marker between the two eras. The former is the era of inextricable faith in an independent and impartial court doing its best to dispense justice, often doing so in impossible circumstances and (understandably) failing. The latter is the era when such view becomes hard to maintain even for believers who have supported the institution all along and interpreted all doubts in its favour.

Those who used to have faith in the Court's counterhegemonic prowess will need to decide how to act further on whatever has remained of that faith. Post-Afghanistan, a commitment to the ideal of international criminal justice will grow ever more distinguishable and distanced from the commitment to the Institution. It would require one to monitor the Institution ever more vigilantly, calling out its biases and

complicities, and keep it to account with far less complacency. Because in this line of business, 'making international criminal justice expedient again' seems to be the only alternative...