[The Growing Crisis With the International Criminal Court](https://www.jurist.org/commentary/2019/05/mark-ellis-crisis-with-icc/)

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In April, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) [refused](https://www.icc-cpi.int/itemsDocuments/190415-afg-qa-eng.pdf) to authorize an investigation into alleged war crimes that have been committed in Afghanistan since 2003. The Prosecutor’s 20,000-page request, issued in November 2017, would have opened a broad investigation, including a probe into possible war crimes committed by U.S. military personnel. The three-member Chamber was unanimous in deciding not to proceed.

The PTC recognized that both the admissibility and jurisdictional requirements set forth in the [Rome Statute](https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf)were met. It also found that the Prosecutor’s request established “a reasonable basis to consider that crimes within ICC jurisdiction have been committed in Afghanistan.” However, the judges ruled that the requested investigation “would not serve the interests of justice.”

The most troubling issue is determining the threshold at which to invoke the interests of justice because prosecution would itself be unjust or counterproductive. There is an ancillary debate about whether such a determination falls within the purview of the Chamber or lies solely with the [Prosecutor.](https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/) There is also a question of whether the Court can refuse an investigation on the basis of limited resources or expectations of difficulty.

As it is commonly known, an “admissibility test” is part of the court review process that arises from an investigation. This “test” refers, in part, to an interests of justice threshold that all ICC situations must meet (see Article 53(1)(c)). In my opinion, this part of the test is shouldered by the Prosecutor when deciding whether to institute an investigation.

The Rome Statute gives neither a definition nor “clear guidance” on the meaning of interests of justice, and the concept is complex. In 2007, the OTP issued a policy paper in which it expounded its own interpretation of the concept. At the outset, the OTP [recognized](http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf) that, as a policy document, it remains subject to subsequent authoritative interpretations of law from the Court. Clearly the OTP recognizes that there is a role for both its office and the judges in dealing with this issue. Still, it is not the job of the Court to independently consider whether a situation meets the interests of justice threshold.

There has always been a presumption in favor of prosecution and an unwritten rule that the Prosecutor should embrace the interests of justice principle only in exceptional circumstances and only “as a course of last resort.” When weighed against the gravity of a crime and victims’ interests, there has never been a situation where the Prosecutor determined that there was no interests of justice to investigate.

Moreover, the Court (Pre-Trial Chamber II) considered the interests of justice provision in March 2010 when ruling on the Prosecutor’s request to investigate the 2007 post-election events in Kenya. In a majority decision upholding his request, the Court [concluded](https://www.legal-tools.org/doc/338a6f/pdf/) that the interests of justice provision imposes no positive requirement for the Prosecutor “to establish that an investigation is actually in the interests of justice”, and, therefore, “the Prosecutor does not have to present reasons or supporting material in this respect.” The Court stated that:

It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber.

In the 2011 Libyan situation, the Prosecutor adhered to this line of reasoning when deciding to institute proceedings. Prior to the formal opening of an investigation into the situation in Libya, the Prosecutor [evaluated](http://www.icc-cpi.int/NR/rdonlyres/EA019818-B8C1-44C8-8C7B-4398F33FF029/283045/StatementLibya_03032011.pdf) the available information and held that the statutory criteria for opening an investigation had been met. As part of this evaluation, the OTP found no evidence that there was any genuine national investigation or prosecution of the alleged perpetrators. Consequently, it [found](http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf.) that the situation “clearly appeared to meet the threshold of gravity required,” and that there were “no substantial reasons to believe that [an ICC] investigation would not serve the interests of justice.”

More recently, the PTC authorized investigations into the situations in Georgia and Burundi. In both cases, the Chamber did not undertake its own independent assessment of whether the investigations would serve the interests of justice. It also did not impose any positive obligation on the Prosecutor to do so. The judges agreed that since the Prosecutor had found no reason to believe that an investigation would not serve the interests of justice, the PTC also [found](https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF) no reason to think otherwise.

Therefore, it is clear that the PTC’s decision to review the interests of justice in this case was based on a reinterpretation of Article 53(1) that is not found anywhere in prior case law.

The PTC focused on “feasibility,” questioning whether the Court could undertake the case given the reality of limited resources. In the eyes of the judges, it would be better to focus on “activities that have a better chance of success.” As Professor Kevin Heller has correctly [noted](http://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/), this is contrary to the OTP’s position that feasibility should not play a role in the interests of justice assessment. Its own policy paper from 2013 [warned](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) that “weighing feasibility as a separate, self-standing factor … could prejudice the consistent application of the statue and might encourage obstructionism to dissuade ICC intervention.”

Evidently, the OTP’s warning was valid, as among the factors deemed relevant to the feasibility assessment, the Chamber listed the current lack of cooperation from states and the bleak prospects of future cooperation, essentially determining that an investigation would not be in the interests of justice because the alleged perpetrators of war crimes do not wish to be investigated. This position has justifiably received widespread condemnation for the message it sends, which is that states can escape accountability for international crimes by simply refusing to cooperate. Furthermore, the lack of cooperation from [states](https://www.justsecurity.org/63746/deconstructing-the-intl-criminal-courts-decision-on-afghanistan/) “is not a selection criteria” under the Rome Statute (Article (87)(7)). In my view, this case serves as an example of why interests of justiceshould not be reduced to a matter of feasibility.

The perception is that the Afghanistan decision was highly [politicized](https://www.ejiltalk.org/afghanistan-and-the-interests-of-justice-an-unwise-exercise/), and that the Court succumbed to political pressure from international power brokers, like the United States. Following the election of President Trump, attacks on international bodies, including the ICC, have been belligerent, relentless and brutal. Trump’s National Security Advisor, John Bolton, used [inflammatory rhetoric](https://www.cbsnews.com/news/in-first-major-address-john-bolton-attacks-old-foe/) to declare the ICC “illegitimate” and threatened the arrest of Court personnel if criminal charges were brought against U.S. military and intelligence staff for alleged war crimes committed in Afghanistan. The U.S. also [revoked](https://www.jurist.org/news/2019/04/us-revokes-visa-of-icc-prosecutor-over-afghanistan-investigation/) the Prosecutor’s visa.

Rightfully, the PTC’s decision has caused an outpouring of scorn from prominent NGOs. The Center for Constitutional Rights in New York [said](https://www.washingtonexaminer.com/opinion/the-international-criminal-court-crashes-and-burns-over-afghanistan) the Court was sending a “dangerous message” that “bullying wins and the powerful won’t be held to account.” Amnesty International similarly [construed](https://www.bbc.co.uk/news/world-asia-47912140) the decision as a “craven capitulation to Washington’s bullying,” as did the Coalition for the International Criminal Court, which [stated](https://www.msn.com/en-za/news/other/icc-accused-of-e2-80-98political-considerations-e2-80-99-over-afghanistan/ar-BBW0dXL%22%20%5Ct%20%22_blank)that “political considerations [had] overridden legal precedents.”

For some, the Court’s decision was welcome. John Bolton [said](https://www.cbsnews.com/news/bolton-claims-victory-as-international-criminal-court-rejects-investigation-into-alleged-u-s-war-crimes/) the decision marked “the second happiest day of my life” – the first being when the US “un-signed” the Rome Statute. The Trump administration celebrated the decision as “a victory for the rule of law.” Israeli President Netanyahu also lauded the decision for “correcting an injustice” and blocking “a move that would have upended the original goal of the establishment of the international court.” He [accused](https://www.jpost.com/Israel-News/Netanyahu-Its-absurd-for-ICC-to-put-US-or-Israeli-soldiers-on-trial-586805) the ICC of unfairly targeting the US and Israel, despite these countries “having the best legal systems in the world.”

International justice is not equitable. International justice is not perfect. A major part of the problem is that instruments of justice do not receive universal support. The United States, Russia, China, and Israel are not State Parties to the ICC. The powerful often escape accountability, while the powerless cannot. This has long been the perspective of many African countries, and underlies their challenges to the Court.

The African Union [accused](https://www.bbc.co.uk/news/world-africa-22681894) the ICC of unduly targeting Africa. The consequences have been real. In 2017, Burundi became the first country to withdraw from the ICC, [condemning](https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court) it as “a weapon used by the West to enslave other states.” Kenya has denounced the ICC as a tool of Western imperialism. While alternative explanations are offered for the seemingly disproportionate focus on Africa, the Court cannot escape the [perception](https://www.cfr.org/blog/kenya-and-international-criminal-court) it has created of itself. Thirty-three of its member states are African (making Africa the largest regional bloc in the ICC). With the Court dependent on the support and participation of its members, maintaining credibility is imperative.

Former ICC Prosecutor Luis Moreno Ocampo got it right when he [called](https://www.bbc.co.uk/news/world-africa-37750978) on the Court to investigate alleged US war crimes in Afghanistan for the precise purpose of  “developing a level playing field with the world’s superpowers.” The Prosecutor’s request to investigate provided an opportunity for the Court to demonstrate its universality and impartiality. The Court’s decision merely shows that justice may be partial after all.