



THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

TWAAILR: Reflections #10/2019

Afghanistan & the Surrender of International Criminal Justice

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The Optimism of TWAAIL

In their canonical piece on TWAAIL and international crimes, Anghie and Chimni expressed optimism for the International Criminal Court (ICC) on the basis that, unlike the Rwanda (ICTR) and Yugoslavia (ICTY) tribunals, its founding statute was negotiated on a consensual basis in a global conference. Presumably the product of this effort would lead to less contestable decision-making by international criminal judges that upended the settled norms of international law that Third World states understood and generally used to guide their actions (even if they were not involved in creating them).¹

A similar guarded optimism also found its way into a more recent symposium on how Third World Approaches to International Law could usefully be applied to international criminal law.² In that symposium, several TWAAIL scholars followed the lead of Anghie and Chimni to suggest that in spite of its myriad flaws, the maturing regime of international criminal justice might still offer much to the peoples of the Third World.

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¹ Antony Anghie & B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' (2003) 2 *Chinese Journal of International Law* 77, at 93–95.
² Antony Anghie & B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' (2003) 2 *Chinese Journal of International Law* 77, at 93–95.

² 'Symposium: Third World World Approaches to International Criminal Law' (2016) 14 *Journal of International Criminal Justice* 916, featuring Michelle Burgis-Kasthala, Vasuki Nesiah, Asad Kiyani, John Reynolds and Sujith Xavier.

Optimism of this sort seems out of step with the robust critiques of the law and the Court offered throughout that same symposium,³ not least of which was the manner in which Reynolds and Xavier described international criminal justice as 'a project that reveals and reproduces much of the international legal terrain's embedded colonial architecture',⁴ before proceeding to examine 'what "TWAILing" international criminal justice might entail for the institutional and operational aspects of the field.'⁵ For Reynolds and Xavier, the presence of international law is thus not intrinsically hegemonic. Rather, it presents an opportunity for normative and institutional transformation by creating space for 'top-down criminal processes to ultimately give way to anti-colonial sensibilities and indigenous notions of justice and restitution.'⁶

This cautious hopefulness that carries across two generations of TWAIL scholarship has nonetheless been tested by the ICC. The ICC's own Judge Brichambaut has described the Court as one where the Europeans pay the bills while '[t]he Africans...provide the suspects and the accused'.⁷ While the reality is somewhat more complex – the Court has begun to examine cases outside of Africa in recent years, although no non-African suspect has yet been arrested or put on trial – Judge Brichambaut's comments are indicative of the hesitancy that characterizes TWAIL understandings of the ICC. Is it truly committed to the interests of ordinary citizens of the Third World, and to holding states – particularly Western and other powerful states – to account? Or is the Court simply replicating the traditional exclusions of international law?

Unfortunately, the recent decision of ICC Pre-Trial Chamber II to not authorize an investigation into crimes allegedly committed during the NATO-Taliban conflict in Afghanistan suggests that any TWAIL optimism may have been misplaced.⁸ While that decision is now under appeal, the reasoning employed suggests a number of concerns relevant to all observers of international criminal law, but especially to TWAIL scholars. In what follows, I briefly review the decision in order to highlight the ways in which these concerns carry significance through their unapologetic deference to the traditional sources of international political power. To

³ As suggested by my Law 343 students at the University of Victoria (Canada) Faculty of Law.

⁴ John Reynolds & Sujith Xavier, 'The Dark Corners of the World': TWAIL and International Criminal Justice' (2016) 14 *Journal of International Criminal Justice* 959, at 965.

⁵ *Ibid.*, 978.

⁶ *Ibid.*, 982–983.

⁷ Judge Marc Perrin de Brichambaut, 'ICC Statute Article 68', Peking University Law School (17 May 2017).

⁸ Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, PTC-II, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' (12 April 2019) [*Afghanistan Decision*].

the extent that Judge Brichambaut is describing that dynamic, the Afghanistan decision is an alarming inflection point.

The Situation in Afghanistan

Rather than being referred by a state or the UN Security Council, the preliminary examination in Afghanistan was opened by the Office of the Prosecutor (OTP) on its own accord in 2008.⁹ The OTP was assessing allegations involving three of the major players in the post-9/11 war inflicted by the United States upon Afghanistan. The Taliban and other anti-government groups were alleged to have committed all manner of crimes against Afghan civilians and foreigners, including attacks by gunmen, bombings (including suicide bombings) and executions, in public and private spaces (including mosques, hospitals and schools), as well as the use of child soldiers. Afghan government forces were said to have attacked a number of non-combatants and civilians, including through the widespread use of torture and inhuman treatment. Finally, the United States military and CIA were alleged to have committed torture, cruel treatment, rape and other sexual violence as part of a formal US policy both inside and outside of Afghanistan.

As the OTP had initiated the investigation on its own (*proprio motu*), the Pre-Trial Chamber (PTC) of the ICC was required to take a step it otherwise does not need to. In addition to assessing whether the allegations fell under the subject-matter jurisdiction of the Court and whether they satisfied the gravity requirement, the PTC needed to assess whether the investigation would be in the “interests of justice”.¹⁰ It was on this nebulous basis that the PTC, for the first time ever, declined to authorise an investigation. The PTC pointed to the eleven years between the initiation of the examination and the request to authorize an investigation; the lack of cooperation (stemming in part, the PTC notes, from political changes in relevant states) in that period; and, the effect that the authorization would have on the Prosecution’s resources.¹¹ In the PTC’s view, the prosecution was simply not feasible.

⁹ Permissible under Article 15 of the ICC Statute.

¹⁰ On whether the PTC was itself entitled to refuse an investigation on these grounds, rather than merely review a prosecutorial decision to decline to investigate on these grounds, see Dov Jacobs, ‘ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision’, *Spreading the Jam* (12 April 2019) <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/>; Kevin Jon Heller, ‘Can the PTC Review the Interests of Justice?’, *Opinio Juris* (12 April 2019) <https://opiniojuris.org/2019/04/12/can-the-ptc-review-the-interests-of-justice/>; Dapo Akande & Talida de Souza Dias, ‘The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice’, *EJIL: Talk!* (18 April 2019) <https://www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/>.

¹¹ *Afghanistan Decision* (2019), at paras. 87–96.

The Judicial *Realpolitik* of Feasibility

While Anghie and Chimni were primarily concerned about judges upending apparently settled norms of public international law (as in the *Tadić* decision), the feasibility determination in the Afghanistan situation presents a different problem of judicial decision-making. Rather than usurp the choices made by states, the PTC has declared that a court in the Hague is better placed than investigators and prosecutors in the field to determine the feasibility of a prosecution, while simultaneously failing to articulate either the standard to be applied or met by the prosecution. Instead the PTC simply repeated information available to the OTP and interpreted it differently, without explaining why or offering the OTP the chance to offer submissions on the issue.

Making that particular decision not only wrested fact-finding priority from the OTP, but also contradicted previous declarations by other judicial panels at the ICC. There is a long list of states where cooperation was entirely or significantly unlikely to be forthcoming at the time the PTC was asked to authorise investigation. In the situations involving Kenya, Georgia, Burundi, Libya, Sudan, Côte d'Ivoire, and Comoros, cooperation was at best only ever going to come from some of the parties to the conflict, and in none of those situations was the territorial state willing to cooperate in investigations into its own actions or those of its associated forces. Yet Afghanistan is apparently uniquely distinct from those cases, and thus the first time the PTC refused to authorise an investigation.

Keen observers of the Court will note that of that list, the PTC was only entitled to consider the interests of justice in relation to the first three, as those are the only other cases initiated by the *proprio motu* power of the OTP. True as that may be, the question of whether cooperation problems in those situations were less significant than Afghanistan is still relevant.¹²

Moreover, putting all these cases together allows one to argue that rather than upending the law of the ICC, the PTC is belatedly but pragmatically recognizing a structural defect of the Court: it depends upon states to an inordinate degree and states are well aware they can use that dependence as leverage to direct prosecutions away from their own agents and towards their political opponents.¹³ In issuing its first tentative definition of “interests of justice”, the PTC is also signalling to the OTP how it ought to make decisions in non-*proprio motu* cases.

¹² All six cases in the Kenyan situation have either stalled or led to charges being vacated or withdrawn, no charges have been laid in the Georgia situation after 3.5 years, and Burundi has left the Court, which does not bode well for the cooperation obligations that technically persist even after such a step.

¹³ See Parvathi Menon, ‘Self-Referring to the International Criminal Court: A Continuation of War by Other Means’ (2015) 109 *AJIL Unbound* 260; and Asad Kiyani, ‘Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity’ (2016) 14 *Journal of International Criminal Justice* 939.

In this light, the Afghanistan decision is perhaps fungible with Kenya and Georgia, but subject to differential treatment simply because of the time at which authorisation was sought. It could be argued that if any of the other *proprio motu* cases appeared before it now, the Court would refuse them. In other words, it might be said that, for whatever reason, the Court only recognized the basic cooperation problem once the OTP sought authorisation in Afghanistan. The decision represents an analytic turn in its decision-making, not a double standard.

Yet this explanation ignores what seems glaringly unique about the Afghanistan situation: not its timing in relation to other cases, but its subjects. Any explanation of the Court's decision must account for the fact that the OTP had sought authorisation to investigate the United States for the torture of detainees inside and outside of Afghanistan.

In this light, the unprecedented decision to deny permission to investigate suggests there is real merit to the allegations of the bias and deference to *realpolitik* that plague the Court. First, it appears the ICC is willing to push the boundaries of its legal authority and pursue the nationals of non-consenting non-State Parties (such as Sudan and Libya), as long as they are not Western or other powerful states. Just weeks after the Appeals Chamber confirmed (in a controversial ruling) that the ICC had jurisdiction over the sitting head of state of Sudan, the ICC refused to permit an investigation of US soldiers.

Second, it implies that American threats against the ICC – to suspend visas, to arrest officials, and to economically sanction or penalize individuals, the Court itself, and states that support the investigation of American soldiers – have worked. The Special Rapporteur for the Independence of the Judiciary has even been asked to investigate whether ICC decision-making was improperly influenced by the US government.¹⁴ American rhetoric on Afghanistan (dating back to Barack Obama's presidency) has become increasingly bombastic, culminating in the hard steps taken by the current administration.

Third, it gives credence to Anghie and Chimni's warnings about the relationship of the international criminal institutions to powerful states and the Security Council membership.¹⁵ In spite of attempts to avoid the strict confines of the UN system through a global conference, the Court nonetheless appears subject to the political interests and whims of great power politics. Having suggested its jurisdiction is near-universal in the Sudan case thanks to the Security Council's

¹⁴ Center for Constitutional Rights, 'Complaint Against the United States of America: Interference with Judicial Proceedings at the International Criminal Court', Communiqué to Diego García-Sayán, UN Special Rapporteur of the Human Rights Council on the Independence of Judges and Lawyers (5 June 2019).

¹⁵ Anghie & Chimni (2003), at 93 and 95.

referral, the Afghanistan ruling is a reminder that this breadth is illusory; the Court willingly accepts formal and informal constraints placed by the Council on the Court's statutory jurisdiction.¹⁶ The political capture initiated at Rome by the inclusion of a Security Council referral mechanism in an attempt to appease the P-5 is now complete; the Court seems unwilling and unable to detach itself from the foundational power imbalances of international law. In this way, any reputational damage, mistrust and cynicism that accompanies the Afghanistan decision is the product of accretion rather than acute overreaction.

Reaccommodating Power: From the OTP to the PTC (and Back Again?)

Reading the PTC decision as the continuation of the Court's deference to power (and specifically Western power) overlooks an important deviation in its pattern of acquiescence: the participation of the judiciary. Prior to Afghanistan, much of the responsibility for the ICC's institutional accommodation of power seemed to lie with the Prosecutor. It was the OTP that for many years refused to investigate all sides in numerous conflicts;¹⁷ that willingly accepted Security Council referrals that restricted the Court's jurisdiction in violation of its own Statute; that carried on investigations at a glacial pace when Western interests were endangered (Afghanistan, Israel/Palestine), only to move at lightning speed when Western interests demanded it (Libya).¹⁸ The Afghanistan decision signals a shift in this approach, with the judiciary being the source of the resistance to OTP attempts to investigate Western actors, including in the broader context of the so-called "war on terror".

In this respect, the PTC decision represents a new strand in Anghie and Chimni's concerns about judicial lawmaking that not only reproduces the geographic blindspots of past international criminal tribunals (dating back to the post-Second World War trials) and disrupts public international law (as in the recent decision on the immunity of then-Sudanese President al-Bashir), but – as outlined below – also starts to fracture the norms produced by the Court itself.

¹⁶ The Security Council referrals of the Sudan and Libya situations amounted to direct attempts at limitations by including, at the behest of the United States, provisions that precluded ICC jurisdiction over peacekeepers acting in those situations. See para. 6 of UNSC Res. 1593 (31 March 2005) and UNSC Res. 1970 (26 February 2011): '6. Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the *Rome Statute* of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.'

¹⁷ A similar pattern can be seen in other tribunals. See Kiyani (2016).

¹⁸ Those decisions reflected criticisms of the ICTY and ICTR, where prosecutors chose not to investigate NATO or the Rwandan Patriotic Front (or the French military).

Narrowing the Scope of Inquiry

Had the PTC authorized the investigation, it would have placed restrictions upon that investigation which diverged from extant case-law. In stating that the OTP would not be allowed to investigate new crimes it learned about or that took place after the authorization unless they had a “close link” to those authorized by the PTC, the judges brushed aside the more relaxed “sufficient link” standard used previously at the ICC¹⁹ and ICTR.²⁰ In other cases, the PTC has permitted investigations of new crimes as long as they ‘involve the same actors and have been committed within the context of either the same attacks...or the same conflict’.²¹ As a result, no crimes committed after the authorization date could be investigated²² unless the OTP obtained new authorizations.²³ As all parties to the conflict continue to be implicated in ongoing violations of international law,²⁴ the requirement for new authorizations is a significant if not ‘illogical’²⁵ obstacle to accountability.

Similarly, the PTC would have forbidden investigations of the torture of detainees outside of Afghanistan on the basis that such acts lacked sufficient nexus with the conflict in Afghanistan. In explaining its reasoning, the PTC states that it must consider ‘[p]roximity in time and/or location, identity of or connection between alleged perpetrators, identify of pattern or suitability to be considered as expression of the same policy or programme’.²⁶ That the PTC merely stated but did not consider how such factors might be satisfied is concerning. Moreover, the PTC says that Common Article 3 of the Geneva Conventions militates against finding a nexus with the conflict, on the basis that the detention sites were outside

¹⁹ Situation in Georgia, Case No. ICC-01/15, PTC-I, ‘Decision on the Prosecutor’s request for authorization of an investigation’ (27 January 2016) paras. 62–64 [*Georgia Decision*].

²⁰ *Prosecutor v. Nsengiyumva*, Case No. ICTR-96-12-I, ‘Decision on the Defence Motions Objecting to the Jurisdiction of Trial Chamber on the Amended Indictment’ (13 April 2000) paras. 27–28.

²¹ Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11, PTC-III, ‘Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the on the Prosecutor’s request for authorization of an investigation into the Situation in the Republic of Côte d’Ivoire’ (3 October 2011) para. 179 (adopting the “sufficiently linked” test from *Nsengiyumva*, *ibid*, in fn. 279).

²² *Afghanistan Decision* (2019) para. 69.

²³ *Ibid*, paras. 40–42.

²⁴ See, e.g., UN Assistance Mission in Afghanistan, ‘Report on the Protection of Civilians in Armed Conflict: 2019 Mid-Year Update’ (July 2019) (noting that while casualty levels had fallen from record highs, over 3800 civilians had been killed or injured to date in 2019, with Afghan and US forces responsible for more civilian deaths than the Taliban).

²⁵ As stated by the judges in the *Georgia Decision* (2016) at para. 63.

²⁶ *Afghanistan Decision* (2019) para. 41.

Afghanistan. No such territorial limitation applies with respect to Common Article 3.²⁷

Prosecutorial Independence

It is also clear that the PTC seeks greater control of the OTP's exercise of discretion. That is certainly its role, but in notable recent cases the PTC had sought to "constrain" prosecutorial discretion by seemingly directing the OTP to *increase* its workload.²⁸ What goes unmentioned is how the examination of American actors dovetails with concerns about a "rogue" prosecutor engaging in "politicized" prosecutions against Western actors. The OTP had previously suggested Americans would not be prosecuted.²⁹ That the judiciary seemingly stepped in to control a "rogue" prosecutor when that unwritten rule appeared in danger will do little to assuage concerns that the ICC is unwilling applying the law to the powerful.³⁰

The PTC further justifies its limits on the OTP by recognising the resource constraints the Court operates under. Authorising the Afghanistan investigation would have budgetary implications and 'result in the Prosecution having to reallocate its financial and human resources...to the detriment of other scenarios.'³¹ While prosecutors should exercise their discretion to ensure that only cases that can lead to conviction are pursued, it is an extraordinary interference for a court that purportedly supports judicial and prosecutorial independence to substitute its own judgment of how the prosecutor should allocate its own resources. Moreover, though the PTC castigates the OTP for its choices, it notably makes no mention of the fact that the OTP is only so constrained because States Parties – led again by

²⁷ See Jelena Pejić, 'The Protective Scope of Common Article 3: more than meets the eye' (2011) 93:881 *International Review of the Red Cross* 1, 11–17 (noting, *inter alia*, that the jurisprudence of the ICTR and United States Supreme Court rejects the argument advanced by the PTC, and that 'the *chapeau* of Common Article 3 may nowadays be evolutively interpreted as a matter of treaty law to apply not only to non-international armed conflicts occurring wholly within the territory of a state but also to armed conflicts involving state and non-state parties initially *arising* in the territory of a state.').

²⁸ In the Myanmar/Bangladesh situation, the PTC 'hinted strongly' that the OTP should investigate two additional crimes, and permitted the 'exponential extension of the ICC's jurisdictional reach'. See Michail Vagias, 'Case No. ICC-RoC46(3)-01/18' (2019) 113 *American Journal of International Law* 368. See also Douglas Guilfoyle, 'The ICC pre-trial chamber decision on jurisdiction over the situation in Myanmar' (2019) 73 *Australian Journal of International Affairs* 5. In the Comoros situation, the OTP initially declined to investigate Israeli Defence Forces actions on the basis of a lack of sufficient gravity, only to have that decision rebuffed by the PTC. An apt summary of the procedural wrangling between the PTC and OTP is found here: Priya Urs, 'Some Concerns with the Pre-Trial Chamber's Second Decision in Relation to the Mavi Marmara Incident' *EJIL: Talk!* (5 December 2018) <https://www.ejiltalk.org/some-concerns-with-the-pre-trial-chambers-second-decision-in-relation-to-the-mavi-marmara-incident/>.

²⁹ Former Chief Prosecutor Luis Moreno-Ocampo once said he 'could not imagine launching a case against a US citizen'. David Bosco, *Rough Justice* (Oxford University Press, 2013) 88.

³⁰ Note, however, the PTC decision in the Comoros situation described in note 28, above.

³¹ *Afghanistan Decision* (2019) para. 95.

Western nations – have consistently argued for zero-growth budgets at the Court. In this light, the decision of the PTC raises as many questions as it answers.

Constraining Future Prosecutions

Observers should be wary of narrowing the implications of this decisions to simply those few cases where the Prosecutor proceeds *proprio motu*. The “interests of justice” must be assessed in every case regardless of whether the PTC is entitled to overrule the OTP’s evaluation of that factor. What does not change is the content of “interests of justice” as a legal concept. In this regard, the PTC description of why the interests of justice favoured not authorising an investigation in Afghanistan can be applied not only to requests for authorization stemming from future *proprio motu* examinations, but presumably must also be recognized as part of the law on “interests of justice”.³² If this definition of “interests of justice” holds, then it may well affect the Prosecutor’s assessment of “interests of justice” in other cases currently under examination. These include the Myanmar/Bangladesh, Iraq/UK and Israel/Palestine preliminary examinations, where comparable cooperation and feasibility issues are likely to arise, and for which the OTP may feel compelled to reconsider its assessments of “feasibility”.

Decontextualizing & Incentivizing Non-Cooperation

Repercussions from the PTC decision will of course extend beyond the Court’s own agents and institutions. While states have already learned that they are able to obstruct and deflect ICC investigations and trials, the Afghanistan decision will embolden them. In addition to interfering with witnesses or denying evidence or information to investigators, states can follow the example of the United States – declaring non-cooperation in advance, threatening the Court and targeting its employees individually. The PTC decision in Afghanistan rewards rather than resists such behaviour.

Curiously, the PTC fails to acknowledge either this likelihood or the reasons for its feasibility determination: that the United States in particular has engaged in egregious threats against the Court and its agents, and coerced other states into not cooperating with the Court as well. This lack of context and its associated lack of condemnation is the most worrying aspect of the decision. A judicial body, faced with clear and unprecedented truculence from the most powerful state in the world, simply demurred and granted that state its wishes.

³² In its appeal, the OTP has asked for clarification on these exact criteria in part because of the wide-ranging impact of the decision. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, ‘Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”’ (7 June 2019) paras. 3–5.

It might be said that little would be served by either the PTC recognizing the underlying reasons for its feasibility analysis, or by the PTC authorizing an investigation it knew it would fail. Better to live to fight another day, perhaps. Yet if one takes seriously the idea that international criminal law can only be justified through its expressivist and didactic functions,³³ then the acquiescence of the PTC presents a remarkable indifference. No words of regret at the unfortunate result, no acknowledgement of the obnoxious behaviour that led to it, and no righteous anger either.

Enabling Complacency

What purpose would have been served by a different course? Denying authorisation while clearly identifying the cause of the problem would have given judicial imprimatur to the necessary condemnation of the United States in this regard. That might have been an important step towards building collective resistance to such coercion, as with the United States' previous blackmail of peacekeeping missions in the UN.³⁴ To paraphrase a different judge of the ICC, it would have shown the institution's willingness to resist, rather than 'be complacent' and 'succumb to the imposition of current political circumstances.'³⁵

By the same token, authorising the investigation would have forced the issue at hand in three ways. First, taking a long view of the situation, leaving the investigation open for many years (as it has been in relation to Sudan and other states) would have permitted a future American government the opportunity to reverse course. This might have been an unlikely possibility given the Obama administration's unwillingness to cooperate, but the current decision forecloses that possibility. Second, it would have compelled the United States to *actually* not cooperate. Again, this seems a foregone conclusion, but it serves the purpose of shifting the onus to the party that is actually in the wrong in this instance rather than suggesting that the OTP was somehow at fault for pursuing an investigation.

³³ See Robert D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law* 39; and Mirjan Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329.

³⁴ The United States threatened to veto the continuation of UN peacekeeping missions if language exempting peacekeepers from ICC jurisdiction was not included. See UNSC Res. 1420 (30 June 2002), UNSC Res. 1421, (3 July 2002), and UNSC Res. 1497 (1 August 2003). See also, Salvatore Zappala, 'Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC' (2003) 1 *Journal of International Criminal Justice* 671. However, as described in note 16, above, similar exceptions have been included in the referrals of Libya and Sudan to the ICC.

³⁵ Bertram Schmitt, 'ICC Judge Schmitt Counsels Resilience to Preserve International Criminal Justice', *Just Security* (19 February 2019) <https://www.justsecurity.org/62577/icc-judge-schmitt-counsels-resilience-preserve-international-justice/>.

Finally, it would have brought forward the reckoning that perhaps needs to happen. It would have compelled the Court's ostensible supporters, particularly its European and Western advocates (who seemingly never waste an opportunity to chastise the wrongs of Third World governments and have willingly used the ICC to legitimate their own war-mongering in Libya), to declare their true loyalties. Are they committed to the ideal of international criminal justice, or just the idea of it? Would these supporters be willing to condemn the non-cooperation of the United States in the same way as they have states that refused to arrest al-Bashir on his diplomatic travels? Or do they actually believe that Judge Brichambaut's description of the Court is also the ideal?

Fortunately for those states, the PTC's deflection has prevented them from being forced to answer that question. At the same time, it has suggested that for certain elements of the Court, Judge Brichambaut should be interpreted as charting a path for the ICC rather than describing its failings. Unless the Appeals Chamber sees the matter differently, the cautious optimism that some elements of TWAIL scholarship have exhibited towards the Court – and that the OTP's examination of the Afghanistan situation has engendered – will seem greatly misplaced.

** An earlier version of this piece incorrectly described the status of the Myanmar and Palestine situations; it has been updated to correct this error.*