



Human Rights Now

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4F Suzuki Bldg., 335 Yamabukicho,
Shinjuku-ku, Tokyo 162-0801 JAPAN

Tel: +81-3-6228-1528

Email: info@hrn.or.jp

Website: <http://hrn.or.jp/eng/>

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Human Rights Now Protests the ICC Decision to Reject Opening an Investigation into the Situation in Afghanistan

Human Rights Now, a Tokyo-based international human rights NGO, strongly protests the decision of the International Criminal Court's Pre-Trial Chamber II (PTC II) to reject the ICC Prosecutor's request to investigate alleged crimes related to the Afghanistan conflict. The Prosecutor requested permission to open an investigation into alleged war crimes and crimes against humanity committed as part of the conflict since 1 May 2003, and the PTC II issued its decision rejecting the request despite clear evidence of such crimes and after more than 10 years of preliminary examination by the Office of the Prosecutor.

The judges found that there was a reasonable basis to believe that war crimes and/or crimes against humanity had been committed by the Taliban, the Afghan military, and U.S. personnel in the territory of Afghanistan since May 2003 and that there were no procedural bars to opening an investigation. However, they rejected the Prosecutor's request on the basis that it would not serve the interests of justice.

The reasons why the judges believed prosecution would not serve the interests of justice in this case include (1) the lack of cooperation that the Prosecutor has received; (2) low chances of a successful investigation and prosecution; and (3) the need for the Court to prioritise its resources on activities with a better chance of success.¹ However, feasibility is not a separate consideration for the Prosecutor to open an investigation mentioned in the ICC Statute, and, even this aside, these reasons make premature and questionable assumptions about the likelihood of cooperation and success. More importantly, they demonstrate a warped view of "serving the interests of justice", which should be focused on the victims, severity of the crimes, and the impunity surrounding them. In this regard, the Prosecutor's submission highlighted a systemic impunity of high-level perpetrators, reiterating the necessity of ICC complementary jurisdiction.

With this decision, the judges of the PTC II set a distressing precedent that discourages ICC prosecution in troubled states that need it the most and encourages states to shield themselves from accountability by being obstructionist, inconsistent with the purpose of the ICC Statute.

¹ ICC Pre-Trial Chamber 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 Apr. 2019, ICC-02/17-33, paras 87–96.

The very purpose of the establishment of ICC is to achieve justice and accountability and to end impunity over gross violations of international human rights and humanitarian law. The most powerful states, such as the United States, should not be left out of circle of international justice when they refuse to hold perpetrators accountable and allow them to commit such crimes with impunity. In the situation of Afghanistan, it has been reported that tens of thousands of innocent civilians have lost their lives since 2003.

Considering the gravity of violations involved, it is unacceptable for the Court to surrender justice for the victims and compromise its central purpose based on feasibility and financial issues. HRN therefore urges the Office of the Prosecutor to take steps to appeal the PTC II decision to the Appeals Chamber. We then urge the Appeals Chamber to approve the Prosecutor's request consistent with the goal of the ICC to see justice served for victims in the face of impunity.