

New York Times (April 13, 2019)

Hague Court Abandons Afghanistan War Crimes Inquiry



By Marlise Simons, Rick Gladstone and Carol Rosenberg

PARIS — The International Criminal Court abandoned a possible Afghanistan war-crimes investigation on Friday, saying the United States and others in the conflict would not cooperate.

The court's chief prosecutor had long sought permission to open a formal inquiry into civilian killings, torture and other abuses in the Afghanistan war, including possible crimes by American forces. But a panel of the court's judges decided that the difficulties of obtaining evidence and witness testimony outweighed the benefits of a prosecution, with a low prospect of any convictions.

The decision was welcomed by the Trump administration and came just weeks after Secretary of State Mike Pompeo said Washington would deny visas to the court's staff and judges involved in prosecuting or ruling on war crimes involving Americans. Last week the State Department confirmed that the United States visa of the court's chief prosecutor, Fatou Bensouda, **had been revoked.**

But the **decision** by the judges, which took nearly 18 months to reach, troubled lawyers and stunned human rights activists, who said the court had capitulated to what they called Trump administration intimidation and pressure that had weakened the court's credibility.

“With its decision today, the International Criminal Court sends a dangerous message: that bullying wins and that the powerful won’t be held to account,” said [Katherine Gallagher](#), a senior staff lawyer for the Center for Constitutional Rights in New York.

While Ms. Bensouda’s office said she was considering her options, including a possible appeal of the judges’ decision, it appeared to dim any hopes of accountability for abuses committed in the Afghanistan conflict, including torture of detainees by C.I.A. operatives at [secret prisons known as “black sites.”](#)

An [announcement](#) from the court said the judges had decided that the impediments to securing evidence and obtaining cooperation meant that “an investigation into the situation in Afghanistan at this stage would not serve the interests of justice.”

While the judges said that there was a “reasonable basis” to conclude crimes had been committed and that the court had jurisdiction, “the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited.”

[The White House issued a statement by Mr. Trump praising the decision, coupled with a reiteration of the longstanding United States position that the International Criminal Court has no jurisdiction to prosecute any Americans, including those who served in Afghanistan or elsewhere.](#)

“This is a major international victory,” Mr. Trump said, “not only for these patriots, but for the rule of law.” He said the United States “holds American citizens to the highest legal and ethical standards.”

The court’s judges said the lack of cooperation so far by all sides — including the United States, the Afghan authorities and the Taliban — meant that pursuing a successful investigation and prosecution would be a poor use of the court’s resources.

Nonetheless, human rights advocates assailed the decision as a startling retreat from the court’s purpose of providing war-crimes victims with a means of seeking justice. Some said the language of the court’s decision masked what was effectively a capitulation to the United States.

[Jamil Dakwar](#), director of the Human Rights Program at the American Civil Liberties Union, said it was “outrageous that victims of war crimes are far less likely to get justice for well-documented atrocities because of the Trump administration’s authoritarian efforts to sabotage an investigation before it could even get started.”

Mr. Dakwar said the administration was “playing a dangerous game” that had severe implications for other prosecutions by the court.

“No one except the world’s most brutal regimes win when we weaken and sabotage international institutions established to fight impunity and hold human rights abusers accountable,” he said.

The retreat on Afghanistan compounds the litany of setbacks that has confronted the court. Burundi and the Philippines have withdrawn from the treaty that created the court nearly two decades ago. Ms. Bensouda was forced to drop a case against Kenya’s leaders in 2014 for lack of cooperation.

The just-ousted president of Sudan, Omar Hassan al-Bashir, has been wanted by the court on charges including genocide for a decade, but the generals who toppled him said Friday they will not extradite him.



Ms. Bensouda requested authorization from the judges in November 2017 to begin a formal investigation into possible war crimes and crimes against humanity that followed the American-led invasion of Afghanistan in early 2002 to rout the Al Qaeda plotters of the Sept. 11, 2001 attacks and the Taliban rulers who had sheltered them.

While Ms. Bensouda’s inquiry would have mostly focused on large-scale crimes against civilians attributed to the Taliban and Afghan government forces, it also would have examined accusations of abuses by the C.I.A. and American military personnel including actions at secret C.I.A. detention centers in Afghanistan, Poland, Lithuania and Romania.

In a clear reference to the black sites, contained in the decision by the judges to abandon the investigation, they wrote that Ms. Bensouda had wanted to look at how C.I.A. agents “mistreated” prisoners “allegedly with a view to forcing confessions, obtaining information or retaliating for” the 9/11 attacks.

The prosecutor, they wrote, argued there was “a reasonable basis to believe that, since May 2003, members of the U.S. armed forces and the C.I.A. have committed the war

crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence pursuant to a policy approved by the U.S. authorities.”

The judges wrote that the prosecutor relied on studies conducted by the Pentagon and Congress, notably by the Senate’s Intelligence Committee, an apparent reference to the public portion of the so-called Senate Torture Report that studied the C.I.A.’s black site program.

The judges also wrote that the prosecutor submitted material that appeared to catalog violations of international law by the C.I.A., including inflicting “extremely cruel, brutal and gruesome” physical and mental pain on its captives; refusing to let captives sleep, eat, drink and pray; as well as shaming captives through “acts of a sexual nature.”

Although the United States is not a member of the International Criminal Court, established nearly two decades ago, American governments have cooperated, or at least not interfered, with the court on some of its work in other investigations.

Americans suspected of having committed crimes in countries that are members of the court are potentially subject to prosecution. Afghanistan, Poland, Lithuania and Romania are all members.

Param-Preet Singh, associate director of the International Justice Program at Human Rights Watch, called the court’s decision a “devastating blow” to victims.

“The judges’ logic effectively allows states to opt out on their obligation to cooperate with the court’s investigation,” she said. “This sends a dangerous message to perpetrators that they can put themselves beyond the reach of the law just by being uncooperative.”

Guenael Metraux, a Swiss scholar who has also appeared before international tribunals in The Hague, said the court’s decision was self-destructive to its own authority.

“Judicially, this is the closest thing to a suicide,” he said. “It’s a catastrophically misguided surrender of responsibilities that will be painted by the U.S. administration as a resounding victory and perceived by others as a model on how to resist the court.”

He said the judges had effectively affirmed the view of critics who argue that the court only prosecutes those too weak to stand up to it.

Some legal experts, however, said the judges had made a sensible decision by foreseeing frustration and failure in prosecuting a case in which all the major parties were not cooperating.

“The perception will be that the court cowed to Washington, but the judges are being realistic,” said Alex Whiting, a former American prosecutor at the court who now teaches at Harvard Law School.

He said that lessons drawn from recent setbacks and failed cases at the court showed it must focus on situations where it can succeed. “The prosecution has already come to that realization and now the judges are too,” he said.

For John R. Bolton, the president’s national security adviser, who has painted the court as a transnational institution that infringes American sovereignty, the retreat on Friday was a major victory.

During the George W. Bush administration, Mr. Bolton led the charge for the United States to “un-sign” the Rome Statute, which created the court — an event he later described as his happiest day in government.

“Today is my second-happiest day in government,” Mr. Bolton said.