



The Promise Institute  
for Human Rights

UCLA School of Law

**TIME TO STEP UP AT THE ICC**



**NO TIME TO TRIM THE SAILS**

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## INTRODUCTION

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In the fifteen years since its inception, the International Criminal Court (ICC), the intended centerpiece of a worldwide “system” of justice for the most serious international crimes, has had serious problems. Some of these have been caused by poor judicial decisions.[1] Others resulted from policy missteps, including inadequate investigations and a prosecutorial docket disproportionate in size to staffing. Other difficulties have stemmed from insufficient funding and a lack of robust diplomatic support for the ICC by its States Parties. This second set of obstacles has been exacerbated by the Court’s performance shortcomings. Finally, but unsurprisingly, the ICC has faced intense opposition. In its latest and most threatening iteration, the Executive Order announced by the Trump administration on June 11, 2020, allowing harsh punitive sanctions, takes opposition to the Court to a new level of virulence.[2] The financially severe measures expected from Washington, prompted by an investigation in Afghanistan, and possibly Palestine, will qualitatively intensify the assault on the Court and the rule of law.

Stepping up its performance and becoming the pre-eminent beacon of criminal accountability worldwide is integrally linked to building the financial and diplomatic support the Court urgently needs. To succeed in its mission, a strengthened Court will require more robust political and financial backing from its member states. This is all the more true in light of the current threats from the United States as well as future sources of opposition as of now unknown.

At the same time, the Court is approaching a potentially crucial juncture. Significant external review and personnel processes were timed, before the onset of the COVID-19 pandemic, to culminate at the end of 2020. Taken together, these opportunities for change offer the chance for ICC officials and the Court’s stakeholders to put the institution on a more solid footing.

The upcoming juncture includes:

- The report and recommendations of the Independent Experts Review (IER). The final report is due in September. [3]
- The election of the next Prosecutor at the 19th session of the Assembly of States Parties (ASP) in December.
- Finally, the election of six new judges at that same meeting.

Implementation of the expected insights from the IER, the election of the next Prosecutor and six new judges – together with other needed changes in policy and practice, some of which are already underway – opens the door to meaningful improvement. While progress is being affected by the COVID-19 virus, crucial decisions for Court officials, States Parties and civil society organizations lie ahead in the next few months.

While the next period offers a unique moment, the opportunities themselves, however significant, cannot be the end point for performance improvement. To the contrary, with a series of expert recommendations and new leadership, rigorous follow-through will be needed to make needed changes operational. With respect for the Court's independence as the essential reference point, communication, dialogue and engagement with the ICC's stakeholders will be essential. The recognition that serious problems—internal and external—have hampered the Court's effectiveness, heightens the urgency to identify the markers of a viable path forward.

The aim of this paper is to stimulate thinking and discussion about the potential of this particular moment in the Court's history. This is a period in which challenges need to be confronted and the possibilities maximized. The document does not offer a comprehensive diagnosis or an overall prescription. The text focuses on the origins of the IER, the potential impact of the review, and the election of the next Prosecutor and six judges. It goes on to make several recommendations regarding the role of the next Prosecutor and the ICC's overall direction. Despite its relatively limited scope, it is hoped that the paper contributes to and is part of ongoing discussion in the months to come.



# PART I - THE INDEPENDENT EXPERT REVIEW

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In May 2019, the Court's President, Prosecutor and Registrar requested that the President of the Assembly of States Parties establish an independent expert review to study and identify causes of the Court's performance failings. The request drew on precedent at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda,[4] as well as the Special Court for Sierra Leone.[5] Outside experts had conducted independent studies of all three entities at earlier points in their institutional lives. The request represented a positive step by the Court's leadership in seeking appropriate guidance. The Principals' request contributed to maintaining the necessary stance for an external expert assessment of an independent international judicial body.

The leadership unit of the Court's Assembly of States Parties, its Bureau, considered the request at several meetings in Spring 2019. The Assembly of States Parties' Working Groups in The Hague and New York also discussed it. Ultimately, following a one-day retreat of the Bureau in The Hague in June 2019, the ASP leadership agreed to lead further consideration. The process, closely debated at every step, took six months to complete, utilizing valuable and limited time. However, in a very significant step, at a Bureau meeting just prior to the beginning of the Assembly of States Parties 18th session (ASP 18 in December 2019), the Bureau named nine experts to staff the Review with three clusters of focus: governance, prosecution and chambers.[6]

## **Problems at the Court**

### ***Chambers***

At various moments in the recent past, the Court's practice has been marked by serious missteps. The May 2019 letter from the Court's principal officers followed a series of deeply disquieting judicial decisions over the previous year. In June 2018, the Appeals Chamber overturned Trial Chamber III's conviction of Jean-Pierre Bemba, former Executive Vice President of the Democratic Republic of the Congo.[7] In that holding, the appeals judges deviated from the accepted

standard for appellate review of a trial chamber’s factual findings. The Appeals Chamber also inserted its own interpretation – a cost-benefit-like analysis of command responsibility – for those commanders deemed to be “remote” from the crimes committed by subordinates.

Six months later in January 2019, Trial Chamber I dismissed charges against former Ivorian President Laurent Gbagbo and a senior co-defendant.[8] Dismissals and acquittals are to be expected where the prosecution’s evidence does not meet the Rome Statute’s high burden of proof, a requirement grounded in basic fair trial guarantees. But six months passed before the Trial Chamber released a written judgment explaining its decision. The inexplicable silence left the victims and communities most affected by the crimes in Côte d'Ivoire stunned and Court supporters everywhere at a loss.

Finally, on April 12, 2019, Pre-Trial Chamber II, responsible for the situation in Afghanistan, denied the Prosecutor’s request to open an investigation there. After acknowledging that all jurisdiction and admissibility requirements had been satisfied, the judges found that the current circumstances in Afghanistan “make the prospects for a successful investigation and prosecution extremely limited.”[9] The Pre-Trial Chamber, invoking the “interests of justice” provision of the Statute, held that “At the very minimum, an investigation in Afghanistan would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.” The Pre-Trial Chamber found a slim likelihood of success there and, citing the “interests of justice,” rejected the Prosecutor’s request.

The Afghanistan ruling, which the Office of the Prosecutor (OTP) appealed, triggered widespread criticism. It seemed to many stakeholders that together the three rulings represented a trifecta of poor judicial reasoning.

Fortunately, on March 5, 2020, the ICC Appeals Chamber reversed Pre-Trial Chamber II’s ruling on Afghanistan. The appellate judges issued a legally sound, coherent ruling, consistent with the Rome Statute. They rejected the Pre-Trial Chamber’s reduction of “the interests of justice” to a budgetary calculation as well as its call to the Prosecutor to





focus on easier situations. This independent judicial decision contradicted the Trump administration's claim of successfully pressuring the Court following the Pre-Trial Chamber decision.

In response to the concerns articulated by stakeholders, expressed from varying points of view, the judges initiated some welcome changes in their working methods. Following a retreat in November 2019, the judges issued a set of "specific deadlines for rendering diverse types of decisions and judgments." These timelines are included in an updated version of the Chambers Practice Manual which prefaces the latest changes by stating:[10]

*These guidelines for the timing of key judicial decisions now introduce a coherent, consistent and predictable system of timeframes regulating work at pre-trial, trial and appeal level. They aim to achieve a significant step forward in respect of the efficiency and expeditiousness of Court proceedings.*

The Manual, which originated as guidelines for the Pre-Trial Division, was expanded and extended to all three judicial divisions within chambers. The measures contained in it represent agreed-upon best practices, but because they are recommendatory, they lack binding effect on the judges.

### ***The Office of the Prosecutor***

There have been longstanding problems in the Office of the Prosecutor that date back to its early years. The current Prosecutor has adopted numerous changes in policy and practice in an effort to rectify past OTP mistakes. She issued important policy papers on case selection and prioritization, [11] on Sexual and Gender-Based Crimes,[12] and on Children. She has published several three-year Strategic Plans and has placed greater emphasis on internal peer review. The Prosecutor also initiated an annual Report on Preliminary Examination (PE) Activities.[13] These reports document the progress, albeit slow, being made in the various phases of the Preliminary Examination process. In addition, the Office has put increased focus on building its expertise in tracking financial assets and utilizing forensic tools. Many of these are "value adding" steps that may be addressed in the IER report.

However, the most difficult strategic problem facing the OTP remains unresolved: the gap between its extensive docket and the Office's limited staffing. The size of the docket, including both preliminary examinations and the more resource-intensive investigations, has become unmanageable. There are currently eight country situations in Preliminary Examination and twelve under investigation. Given the budget-driven shortfalls in OTP staffing, the disparity is striking.

Regarding the budget, the "Group of Seven," the largest budget-contributing States Parties, have rigidly adhered to a policy of "Zero Nominal Growth" for the Court. This has meant limiting the ICC's annual budget increases to the rise in the cost of inflation. The "Group of Seven" has remained indifferent to the gap between prosecutorial needs and funding with its negative ramifications for the Prosecutor's work and the related effect on those in the communities most affected by the crimes looking to the ICC for justice. Given the impact of the COVID-19 pandemic on governments' spending, financial constraints on the OTP will very likely remain. With several Preliminary Examinations about to be concluded and likely new investigations opened, it is imperative for the current Prosecutor to address this disparity. Without tying her successor's hands, she should leave the next Prosecutor with a roadmap to act on or to reformulate.

## **Maximizing the Impact of the IER**

The Independent Expert Review should provide a high quality analysis of the key shortcomings in the Court's practice together with a set of insightful recommendations. To be persuasive, the analysis and accompanying recommendations will, of course, have to be based on careful documentation.

It is imperative that these recommendations are followed up with thoughtful consideration by Court officials, States Parties, and civil society organizations. The core of these recommendations could form a commonly agreed upon framework for change. Ultimately, it is up to Court officials, in discussion with States Parties and civil society organizations, to formulate plans to extract the maximum possible value out of the findings and recommendations. This will best





occur through a continuing course of constructive dialogue in which the next Prosecutor should play a leading role.

It would be desirable if the findings and recommendations could also furnish one basis for the evaluation of those on the shortlist of prosecutorial candidates. IER-generated issues should provide a fair gauge to assess the capabilities of each candidate. With appropriate modifications and time permitting, the same approach could be used with the judicial nominees.

Beyond this, these findings and recommendations should have a much greater “value-adding” effect as a source of guidance to the new Prosecutor and all 18 judges. This approach should be a point of departure for all supporters of the Court who are cognizant of the need for improvement.

To accomplish this, at least one significant “process” correction will be needed. The consultations to launch the IER occurred predominantly among states party representatives in The Hague. However, many ICC member states do not have representation there and were thus not included in those discussions. Following the issuance of the final IER report, a more inclusive process will be crucial to bringing a broader number of States Parties into the exchange. This will require a greater effort to engage New York-based delegations along with those in The Hague. The exclusion of a significant number of States Parties is not the way to broaden and deepen support for the ICC.



## PART 2 –THE UPCOMING ELECTIONS

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### Prosecutorial Qualifications

The elections scheduled for December 2020 rank as among the most important in the Court's history. The choice of the next Prosecutor will be the most consequential Court-related decision the 123 States Parties will be making for some time. Contrasting visions of the Court's future will doubtless feature prominently in this process and it is imperative to get this choice right. Together with the six new judges, the election of the next generation of ICC leaders is at stake. These officials will have a determinative effect on the Court's standing through 2030 and beyond.

After fifteen years of experience, it is clear why the choice of the next Prosecutor is of such overriding importance. The Prosecutor is the engine of the institution, powering forward its mandate and objectives. The improvements needed in the Court's performance will rest to a substantial degree on the next Prosecutor. To that end, the Assembly of States Parties created a Committee on the Election (CEP) of the Prosecutor.[14] The shortlist of candidates just recently released by the Committee bears the closest scrutiny, including, very importantly, though well-organized, inclusive and transparent public hearings.

To elect the most qualified candidate, a broad-minded vision among States Parties and a process insulated from external influence will be necessary. The CEP's Vacancy announcement for the position did a commendable job enumerating the key qualities needed.[15] The Vacancy posting flags "Professionalism, Judgement/decision making, Integrity, Strategic awareness, Leadership, Financial competencies, Planning and Organizing, Communication, and Digital Technology."

Demonstrated excellence in conducting complex, international criminal proceedings from investigation, to trial through appeal is the characteristic that must be given the greatest weight in making this choice. The ICC Prosecutor must have the requisite mastery of the Rome Statute, and international criminal law and its actual application in the courtroom to be its "chief lawyer."





Without diminishing the importance of this requirement, the attribute of “independence” merits especially careful consideration by States Parties. While the term is referenced in conjunction with “Judgement/decision making” as well as “Leadership,” it is not linked to “Integrity” in the Vacancy announcement.[16] An ICC Prosecutor needs the strength of conviction and character to withstand the intense pressures of the job. A steeled commitment to principle and the ability to withstand pressure from external—and internal—sources are difficult traits to assess in easily quantifiable terms. These cannot simply be “checked off” as one box on a list, but they are at the core of what is needed in the next Prosecutor. This trait requires a fundamental commitment to the mission of the Court as an institution that transcends any particular state, political, or professional interest. What is needed is a vision sufficient to withstand pressure by powerful actors.

The ICC Prosecutor’s decisions take effect in highly contentious country situations and can have a seismic political impact there. This comes with the job. An effective independent prosecutor working on a highly political terrain needs to be astute about that landscape while not bowing to or accommodating “political realism” to do the job. International prosecutors have often acted effectively in such circumstances. They have been able to maintain their actual and perceived independence by adhering to first principles—fairness and impartiality in applying the law—without fear or favor. This trait is a characteristic of the current ICC Prosecutor. Even without sufficient backing by States Parties, she has demonstrated a deeply principled and admirable independence.

Such independence is distinct from stubbornness as well as its quick and self-serving invocation as a shield against principled questions and constructive criticism. Among the short list of candidates, this quality needs to be probed by ICC States Parties and civil society organizations as a crucial issue in the upcoming phase of the election process.

The next Prosecutor must also have proven managerial ability directing a diverse staff. This includes a record of unlocking the best performance from skilled criminal justice professionals. It requires successful experience imbuing a sense of teamwork towards common goals.

Finally, the Prosecutor must model, in a deep going way, the ability to articulate and implement changes in institutional culture when needed.

## **The Prosecutor as Chief Advocate**

Experience since 2003 has demonstrated the multiple demands on the ICC Prosecutor. While the job verges on the impossible, there is an area that calls for innovation: the Prosecutor is not only the OTP's "chief lawyer," but as regards the Office's public profile, she is also its "chief advocate." While being the first-rate "chief lawyer" is the necessary prerequisite, by itself, it is not sufficient to obtain results in the difficult arena of international justice. To realize goals on this complicated and difficult terrain, as Victor Peskin argues insightfully in *International Justice in Rwanda and the Balkans*, the Prosecutor needs to use her mandate as a bully pulpit to make maximum use of the Court's "soft power" as the Court's "chief advocate." [17]

Functioning as "chief advocate" requires various skills. These include: a keen strategic grasp of the political terrain within a country situation; a similarly acute grasp of the relevant political dimensions of the international landscape; the ability to remain firm in principle while being flexible in tactics; and an evolving sense of the Court's "soft power" and the use of the "moral capital" stemming from the fight against impunity for the most grave crimes.

Admittedly, the Court's moral capital has been diminished. This stems from several sources, including disappointed expectations and fiercely unprincipled frontal assaults on the ICC. But with the ongoing commission of atrocity crimes in Syria, Myanmar, and South Sudan (all ICC Non-States-Parties), the public expectations for criminal accountability through fair trial—through the ICC or other fora—remain palpable. While the water in the ICC's "reputational well" may be low, it is certainly not dry. An effective Prosecutor, functioning skillfully as "chief lawyer" and "chief advocate," is central to revitalizing and marshaling the support the Court needs.

Previous tribunal prosecutors did not simply wait for international support to materialize. As Peskin puts it, by making the most of their institutions' moral capital, "in the face of once seemingly insurmountable odds of state defiance and international indifference, the tribunals have





succeeded in ways that skeptics once thought impossible.”[18]

Drawing on the experience of the ICTY and the Special Court for Sierra Leone, there are essential lessons for the next ICC Prosecutor to learn from the role prosecutors there played—albeit in different circumstances—to obtain the most difficult, but hardly the only form of needed cooperation: arrest and surrender of indictees. Successive ICTY Prosecutors used “naming and shaming” as well as incentives in tandem with the European Union’s (EU) policy of “conditionality” with Serbia and Croatia. “Conditionality” linked EU membership talks to “full cooperation” with the ICTY by these two states. For the most part, the ICTY Prosecutors defined “full cooperation” as arrest and surrender of tribunal indictees. The Prosecutors at the Special Court for Sierra Leone (SCSL), working together with supportive states, used other points of leverage in very different circumstances to obtain Charles Taylor’s eventual arrest. The background conditions and the specific tools may vary, but as its “chief advocate,” the next ICC Prosecutor needs to wield the moral authority of the position strategically and smartly in pursuit of the Office’s goals regarding arrest and surrender of suspects and other forms of needed cooperation.

Looking ahead to the term of the next Prosecutor, it is necessary to underscore the glaring differences between the conditions the ICTY Prosecutors faced in the years between 1995 and 2010 as well as those confronting the SCSL Prosecutor between 2003 and 2006 and the very challenging situations the next ICC Prosecutor will face.

This reality provides all the more reason for the incoming Prosecutor to step out visibly as the Office’s “chief advocate.”

There are concrete steps the next Prosecutor could take as “chief advocate” to advance the OTP’s mission. Given the ICC’s weak enforcement powers, both improved performance and new approaches to obtaining state cooperation on arrest will be required. In that spirit, there are several steps the next Prosecutor should consider:

- Where the arrest warrant is public, developing arrest strategies and campaigns based on particular suspects to highlight the urgency of their apprehension. These should be scalable depending on other developments;

- Where the arrest warrant is public, making clear, in well-timed statements, the name of the fugitive suspect and the crimes of which he is suspected.
- Making clear the effect of those alleged crimes on the victims; sharing the victims' stories to put a human face on the urgency of arrest;
- Drawing the connection between arrest and the communities most affected by the crimes through depicting the consequences of the fugitives remaining at liberty;
- Choosing and using every relevant forum to press these points privately and publicly to gain maximum attention for the exertion of pressure;
- Hiring a veteran diplomatic advisor with a justice background to advise on maneuvering through the political terrain;
- Hiring an experienced spokesperson to assist in the formulation and publication of the message.

## **The Election of Six New Judges**

At its upcoming session in December 2020, the Assembly will elect six new judges—a third of the ICC's eighteen member bench—for a tenure of nine years. Electing the judges to sit at the ICC is a crucial form of stewardship that ICC States Parties provide the Court. Member states have an enormous responsibility to ensure the merit-based election of the most highly qualified candidates. The states concerned about the efficiency of the ICC need to emphasize electing judges with demonstrated excellence in complex criminal proceedings, whether as a judge, prosecutor or defense attorney. There is an urgent need and an enhanced basis to elect judges with this qualification in December.

At its session in 2010, the ASP created an Advisory Committee on Nomination of Judges ("the Committee") to strengthen the quality of the judges elected. The Committee did introduce some positive changes. However, its limited terms of reference curtailed group's impact. At the Assembly session in 2019, with past elections in mind and the importance of the 2020 election in view, States Parties agreed to strengthen the Committee's mandate. These changes were adopted in a stand-alone resolution along with two Annexes. The resolution gave additional authority to the





Committee to facilitate merit-based decisions. States Parties authorized this group to ask judicial candidates about their history in managing complex criminal proceedings or their experience in public international law. Additionally, candidates were required to demonstrate their legal knowledge as well as to pro-actively report any allegations of misconduct involving sexual harassment. The strengthened mandate also allows the Committee to provide a confidential assessment to a state party of a potential judicial nominee before that state formally names that person as a candidate. The provision then permits a member state to withdraw the potential candidate the Committee deems to be unqualified before there is any public consideration.

In the limited time remaining before December, it is important that the Committee attempts to implement as much of its enhanced mandate as possible. To date, the group's important work has been hindered by the COVID-19 pandemic. If the pandemic or lack of time or resources prevents the Committee from being able to carry out some or all of its newly authorized functions, reference to that and any lessons learned should be included in the group's summation of its work to benefit its future efforts.

Finally, to fulfill their responsibilities in electing the most qualified judicial candidates, States Parties should resist the practice of "vote-trading" which has been all too frequent in these elections. This is the practice by which a state party agrees to support a second state's candidate in the ICC election in exchange for a commitment by that second state to back a candidate from the initial promisor state in some other election. This frequently occurs with minimal regard to a candidate's qualifications. States Parties should publicly commit to making merit the decisive criterion and discourage voting on a quid pro quo basis.

On this basis, States Parties can contribute significantly to improving the efficiency of proceedings as well as the quality of judgments by the Court.

## **PART 3: THE NEED FOR STEPPED UP STATE PARTY SUPPORT WITHOUT “TRIMMING THE COURT’S SAILS”**

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### **The Need for Stepped Up State Party Support**

The ICC depends on the cooperation of its States Parties to do its work. Without that support neither this Court nor any other international tribunal could possibly succeed. The cooperation regime of the Rome Statute enumerates multiple forms of assistance that the Court may request from its member states and that they are obligated to provide. Cooperation includes providing the ICC requested documents and records; the execution of searches and seizures; the tracing or seizing of assets; the protection of victims and witnesses through relocation agreements; the preservation of evidence[19] in addition to the arrest and surrender of suspects.[20] All of these play a role in advancing the ICC’s objectives.

The obligation to cooperate is most sharply tested when it comes to arresting suspects who are on the territory of States Parties. To obtain arrest and surrender often requires applying external pressure as well as incentives to shift the political will among national authorities. There have been all too many instances in the ICC’s history where that political will has been lacking. Former Sudanese President Omar al-Bashir’s almost unimpeded travel to a number of African States Parties highlighted this. At the same time, in instances of non-cooperation by States Parties, the Court’s enforcement measures are relatively weak.[21] The balance needs to shift to greater willingness to arrest. As discussed earlier, the irrefutable lesson from earlier tribunals is that the Court and its States Parties need to find the ways to do this most effectively.

However, the ICC needs more than assistance in the practical forms of cooperation and securing custody of suspects. Given its potential global reach, the Court can - and has - engendered fierce opposition to the exercise of its mandate. The Court has faced this kind of frontal challenge twice in the past. The virulent threats from the Trump administration are the third and most aggressive wave of this existential opposition.





To address this kind of assault, the ICC requires staunch political and diplomatic defense. It is noteworthy that in two previous instances, the urgent “stand up” diplomatic backing of States Parties contributed to rebuffing the attacks.

In 2002, the European Union moved to protect the nascent ICC, its States Parties and the integrity of the Rome Statute. At that time, John Bolton, as an Assistant Secretary of State in the administration of United States President George W. Bush, tried to derail the ICC shortly after the Rome Statute entered into force. United States diplomats and Pentagon officials pressed States Parties to violate their responsibility to cooperate with the Court by acceding to “bilateral immunity agreements.” The agreements codified arrangements by which member states agreed not to surrender to the Court a United States national sought by the ICC. This effort engendered firm pushback by States Parties angered by Washington’s unlawful objective and heavy-handed tactics. Even though a number of these agreements were signed, the resistance was so widespread that when Condoleezza Rice became Secretary of State, she acknowledged that the “bilateral immunity agreement” policy was akin “to shooting ourselves in the foot.”[22] In its second term, the Bush administration ceased its punitive efforts and began, on a situation-by-situation basis, supporting Court investigations.

On October 21, 2016, news broke that the South African Minister of International Relations and Cooperation had issued official notification of South Africa’s withdrawal from the International Criminal Court.[23] This followed years of repeated threats by Kenya’s President, an ICC accused until charges against him were dropped, that a large number of African member states would withdraw from the Rome Statute. On that same evening, many member states with embassies in The Hague joined an unusual Friday night meeting to discuss strategy and tactics to address the threat of withdrawal by other African States Parties. A number of these member states conducted diplomatic outreach from their capitals as well as through their embassies in Pretoria. In the end, only Burundi, a virtual pariah state among its neighbors, and the focus of an ICC Preliminary Examination, made good on the threat to withdraw.

The threats now being made by the Trump administration against the Court over an investigation in Afghanistan and a possible Palestine investigation underscore the urgency of



member states mounting a staunch defense in principle of the ICC. The Trump administration's Executive Order of June 11 allows sanctions, normally used against terrorists, to punish prosecutors, judges and other Court staff examining allegations of the most grave crimes. This is a defining moment for the Court and its States Parties. Drawing on the past practice cited above, member states will need to take a number of steps to safeguard the ICC's independence.

The United States administration's assault prompted an initial strong showing of support for the Court. On June 24, 67 ICC states, more than half the member states, signed a joint statement initiated by Switzerland and Costa Rica.[24] Given the United States administration's intense antipathy to the ICC and the likelihood that individuals and/or entities will be "designated" for sanctions, states parties will need to go further than one joint statement. The most strongly supportive governments will need to formulate a strategy containing a set of various diplomatic actions to raise the political price for Washington's unprecedented move against an international court.

### **No Time to "Trim the Sails"**

In selecting country situations for investigation, while managing its already over extended docket, the next Prosecutor needs to continue to apply the Rome Statute's jurisdictional provision as the current Prosecutor has done "without fear or favor." This is not time to "trim the sails" or narrow the ICC's vision. The Court needs to continue moving towards the objectives the drafters in Rome envisioned. While showing results is indeed important for this Court, obtaining those results through an exclusive focus on countries and accused that represent "low hanging fruit" cannot define prosecutorial policy.

There is a solid cohort of mid-sized and smaller ICC member states committed to actively sustaining the Court's jurisdictional reach. An increasingly well performing Court applying its statute in a strategic way will rally this contingent together with other States Parties. This means, in part, pursuing individuals from more powerful states as well as those representing less powerful governments where the jurisdictional regime and the available evidence permits. An illustrative moment in the negotiating history of the Rome Statute sustains this assessment.

Well before the Rome Diplomatic Conference began in June





1998, a key objective of the Like-Minded Group, the bloc of states seeking a genuinely effective and independent court, was the equal application of the statute to all responsible for the gravest international crimes. This bloc was motivated by the possibility of reducing the disparity in the reach of international justice between the developed world and the Global South. From their perspective, the ICC represented a vehicle that could begin to reduce the unevenness or double standard in applying the rule of law to those believed to be committing genocide, crimes against humanity and war crimes. This commitment was a key factor in the formation and decisive role of the Like-Minded Group throughout the negotiations.

The Like-Minded Group's insistence on this point was clear during the Rome Diplomatic Conference. These states sought the broadest possible jurisdiction for the proposed court. The United States and other Permanent Members (P5) of the United Nations Security Council opposed that. On July 8 and 9, conference Chair Philippe Kirsch convened a crucial session of the body's key negotiating unit, known as the Committee of the Whole. Kirsch wanted to canvass delegations on the decisive "package of issues" at the core of contention going into the Diplomatic Conference's final week. The statute's bases for the court's exercise of jurisdiction was one of the issues.

Significantly, four out of five delegations responded by calling for four bases to be included in the jurisdictional provision of the Rome Statute.[25] As proposed originally by the Republic of Korea, these bases included: i) the state on whose territory the crimes occurred; ii) the state of nationality of the accused; iii) the state with the suspect in custody; and iv) the state where victims were located. This support was not an abstract stance. Supported by nearly 80% of the delegations taking the floor over those two critical days, the position had everything to do with the reach of the future ICC. According to David Bosco's assessment in *Rough Justice: The International Criminal Court in a World of Power Politics*, the Like-Minded Group (overwhelmingly mid- and small-sized states), driven by their vision of the future court, were able to push past most of the controls sought by some of the P5.[26]

The attempts of the Permanent Five to negotiate a compromise that they were comfortable with came to naught. According to Bosco, the compromise included language that would have allowed states to join the Court while remaining outside its jurisdiction through a broad “opt out” provision. Some among the P5 sought to reinforce that loophole with another exception that would have barred the Court from exercising its jurisdiction over the “official actions” by individuals from Non-State Parties.[27]

Bosco described the Like-Minded Group’s intensely negative reaction to this “compromise” proposal which had been negotiated by the leader of Japan’s delegation. This failure led France and the United Kingdom to split off from Russia, China and the United States, and the temporary coalition of the P5 collapsed. This “reflected a broader unwillingness [among the Like Minded group] to yield to major power concerns.”[28]

Though ultimately these bases of a broader jurisdiction reach did not appear in the Rome Statute, the principled show of support highlights that a large group of states parties was ready to coalesce around a bold vision. The lesson here is that support for the Court will follow principled action, but will not be galvanized by attempts to avoid difficult situations. The debate at this Committee of the Whole session provides guidance for the Court’s next Prosecutor. Along with enhanced performance, an approach committed to equalizing the application of international criminal law is consistent with the views of the great majority of states in Rome. Moving smartly in this way will facilitate rebuilding support for the Court. This will not happen easily or quickly, but an increasingly high performing ICC that is pursuing allegations against individuals from developed countries where the statute and evidence permit, will, over time, engender more backing. “Playing it safe” and going after the “low-hanging fruit” will not.





## CONCLUSION

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The Court has had more than its share of problems in Chambers and the Office of the Prosecutor. These performance shortcomings have undercut the Court's effectiveness as well as its standing.

However, there are crucial opportunities for improvement ahead that are integrally linked to increasing political support for the ICC. It is imperative to strengthen the Court's performance through maximizing the impact of the recommendations of the Independent Expert Review. This must be done in a way that is consistent with the Court's independence as a judicial institution. Electing the most qualified prosecutorial candidate to play a more visible role not only as the Court's "chief lawyer," but as its "chief advocate" is essential. States Parties need to focus on excellence in courtroom experience to elect the most qualified six judges.

The ICC is currently working in a very difficult international landscape. The Court is under intense assault at a moment of declining support for the rule of law by some governments. While the ICC's luster has dimmed, the need for a well-functioning permanent Court, applying its statute without "trimming its sails," is indisputably more urgent than ever.


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- [1] See e.g. Prosecutor v. Bemba, ICC-01/05-01/08-3636 Red, Majority Opinion of Judge Wyngaert, 7 n.7 (June 8, 2018); Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, ICC-02/11-01/15-1263, Reasons for the oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defense no case to answer motion (July 16, 2019); Situation in the Islamic Republic of Afghanistan, ICC 02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (April 12, 2019).
- [2] Exec. Order No. 13928, 85 F.R. 36139 (2020)
- [3] Resolution on the Review of the International Criminal Court and the Rome Statute system, ICC ASP/18/Res.7 Section A para. 9 (Dec. 6, 2019).
- [4] Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, A/54/634, November 22, 1999.
- [5] Report on the Special Court for Sierra Leone Submitted by the Independent Expert, Antonio Cassese, December 12, 2006.
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- [8] See the transcripts of the hearing held on 15 January 2019, No. ICC-02/11-01/15-T-232-ENG ET, page 2, line 25 to page 5, line 7. Available at [https://www.icc-cpi.int/Transcripts/CR2019\\_00115.PDF](https://www.icc-cpi.int/Transcripts/CR2019_00115.PDF)
- [9] Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of and Investigation into the Situation in the Islamic Republic of Afghanistan, page 32 (April 12, 2019).
- [10] Int'l Crim. Ct., Chambers Practice Manual, at i (Last updated Nov. 29, 2019) available at <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf> Int'l Crim. Ct., Chambers Practice Manual, at (Last updated Nov. 29, 2019) available at <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>
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- [12] Int'l Crim. Ct., Policy Paper on Sexual and Gender Based Crimes, The Office of the Prosecutor (June 20, 2014), [https://www.icc-cpi.int/iccdocs/otp/Policy\\_Paper\\_on\\_Sexual\\_and\\_Gender-Based\\_Crimes-20\\_June\\_2014-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf)
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[14] Interim Report of the Committee on the Election of the Prosecutor, ICC-ASP/18/INF.4 (Nov. 13, 2019).

[15] Vacancy Announcement, Int'l Crim. Ct. Assembly of States Parties (Aug. 2, 2019), available at [https://asp.icc.cpi.int/iccdocs/asp\\_docs/ASP18/ICC-CEP%20Prosecutor-VA-2Aug2019.1500bis-ENG.PDF](https://asp.icc.cpi.int/iccdocs/asp_docs/ASP18/ICC-CEP%20Prosecutor-VA-2Aug2019.1500bis-ENG.PDF).

[16] *Id.* at 4.

[17] Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, 237 (2008).

[18] *Id.*

[19] Rome Statute of the International Criminal Court art. 93, July 17, 1998, 2187 U.N.T.S. 90

[20] *Id.* at article 89

[21] *Id.* at article 87(7)

[22] Referring to the policy of cutting off aid to states parties in the Americas that refused to sign "bilateral immunity agreements," United Press International, March 21, 2006, (UPI) quoted US Secretary of State Condoleeza Rice as saying, "[W]e're looking at the issues concerning those situations in which we may have, in a sense, sort of the same as shooting ourselves in the foot" by cutting aid to "countries with which we have important counterterrorism or counterdrug" initiatives or cooperation on Afghanistan and Iraq.

[23] Sewell Chan and Marlise Simons, "South Africa to Withdraw from International Criminal Court," *The New York Times*, October 21, 2016.

[24] Anthony Deutsch, Stephanie van den Berg, "International Criminal Court members defend it in face of U.S. sanctions," Thomson Reuters, June 23, 2020.

[25] The Rome Treaty Conference CICC Monitor, Issue 21, July 13, 1998, contained in Rome Report of the Coalition for an International Criminal Court, (2018).

[26] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, New York, (2014), 49.

[27] *Id.*

[28] The deletion of two of those four bases of jurisdiction (the state with the suspect in custody and the state where victims were located) occurred at the last moment of the Rome Conference in a less than transparent manner that left the like-minded group little choice but to accede.