



**Cour
Pénale
Internationale**

**International
Criminal
Court**

Le Président
The President

Judge Chile Eboe-Osuji
President
International Criminal Court

*Remarks at the opening of the
18th Session of the Assembly of States Parties to the Rome Statute*

*2 December 2019
The Hague, The Netherlands*

Monsieur le Président et Messieurs les Vice-
Excellences,
Mesdames et Messieurs

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Aujourd'hui, plus que jamais, nous avons besoin que vous souteniez fermement la Cour pénale internationale dans la mission que vous lui avez confiée — mission qui fait ouvertement l'objet d'attaques.

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During the past 15 months, the ICC has been subjected to unprecedented threats in a very public way, from leading officials of the incumbent Government of a powerful country.

In September 2018, the former National Security Adviser to the United States Government, Mr Bolton, made a highly-advertised speech: announcing a 'policy' position of his Government on the ICC. The remarkable feature of that speech was the very direct and undisguised threats that he made against ... your Court: should the Court's judges grant the Court's Prosecutor her request for authorisation to conduct investigation into the situation in Afghanistan.

With the stated aim of preventing such a possibility, Mr Bolton threatened the ICC and its personnel with economic sanctions. To be sure, he threatened the Court's Prosecutor – and even the Judges – not only with economic sanctions; but also with what lawyers call malicious prosecution.

But, the significance of these threats is unmistakable. They were made because the Court and the targeted officials dared to consider whether the Rome Statute directs them to execute the mandate you have entrusted upon them.

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It must be kept in mind that Afghanistan is a State Party to the Rome Statute. It must be underscored that the investigation that the Prosecutor is requesting authorisation for chiefly concerns whether any of the crimes that the Rome Statute forbids has been committed in the territory of a State Party. And, it must be emphasised that she is not seeking to investigate whether any of those crimes occurred on the territory of the United States.

In the circumstances, there is absolutely no legitimate basis for the recrimination against the ICC – let alone the threats - for considering whether the Court may exercise its jurisdiction.

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In subsequent developments, the US Secretary of State, Mr Pompeo, appeared to confirm those threats. To show that they meant the threats, he announced the cancellation of the Prosecutor's standing travel visa to the United States. And, he indicated that more actions may follow, depending on the outcome of the pending proceedings.

As recently as 9 October this year, the Secretary of State once more issued a statement, in view of the pending appeals on the Afghanistan situation - the hearing of which is coming up this week. In the statement, he confirmed again that the US 'policy' on the ICC remains unchanged.

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It may be noted that in the language of these threats, the demand is that the Court must 'change course'.

Now, let us be clear about what is meant by these demands to ... 'change course'. These threats were made in a very plain and unvarnished attempt to subvert the 'course' of action of a legitimate multilateral judicial institution. That is to say, once more, a judicial institution that is exploring the legal propriety of exercising the mandate of humanity that your countries – as represented in this hall and beyond – have given to it in the text of the Rome Statute.

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It is, of course, axiomatic to say that these threats are entirely out of place in the ethos of the rule of law and proper conduct.

But notwithstanding that the Court will do its work undeterred, I must urge, in the most fervent terms, that YOU, the States Parties to the Rome Statute, must do all that it takes – and be prepared to do more – to counter these threats, in all their ramifications.

You must allow no scope for conducts so extreme – the declared and evident purpose of which is to embarrass and destroy the very idea of judicial independence and prosecutorial independence in ... your Court.

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In all of this, the one thing that must always be kept uppermost in the mind is that the jurisdiction of the Court remains a contingent one. Contingent, because the primacy of jurisdiction belongs to any State that either has a territorial connection to the crime or a nationality link to the suspect. That primary jurisdiction displaces, in fact, the complementary jurisdiction of the ICC.

It is an essential part of the functions of the judges to serve as the gate-keepers of that norm of complementarity.

To put it plainly, the ICC does not barge in, grab jurisdiction and exercise it: when states with connections of territoriality or nationality are demonstrably ready, willing and able to investigate and prosecute - genuinely - a crime proscribed in the Rome Statute.

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Mr President, excellencies, ladies and gentlemen:

The suggestion has been made – sometimes even openly – that when States with able judicial systems chose not to investigate or prosecute; it is not open to the Court to second-guess such decisions. But, that is an argument, I urge, that must be pressed – if at all - with extreme care. For, legally speaking, that argument is not readily reconcilable with the very *raison d'être* of the ICC – as a court of last resort. And, politically, such arguments tend to fuel the fear - so openly expressed from certain parts of the world - that the ICC runs a risk of being an instrument of the more powerful States against the weaker ones. This is a fear that we have worked very hard at the Court to allay. I have personally spent so much energy in that regard. That fear should not be given new impetus.

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In my speeches, I have often quoted the multilateralist sentiments of Robert H Jackson, the eminent American jurist who served both as the US Chief Prosecutor in Nuremberg and a Justice of the US Supreme Court. I quote him again:

It is futile to think ... that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are

prepared to have that law sometimes operate against what would be our national advantage.'

Although Mr Justice Jackson was speaking to his compatriots, those words speak good sense – in an irrefutable way - to all nations that plan to live in a peaceful and orderly world. That ambition of a peaceful and orderly world is simply unattainable without international law - even with all its imperfections. As Jackson put it himself:

'Those who best know the deficiencies of international law are those who also know the diversity and permanence of its accomplishments and its indispensability to a world that plans to live in peace.'

Those words remain as true and as relevant today as they were in 1945 when he spoke them.

This Court is and remains, in our own time, a foremost instrument of that imperfect international law – intended precisely to foster 'a world that plans to live in peace.'

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Excellencies, ladies and gentlemen:

No doubt, an overarching theme in this session of the Assembly will be the review of the Rome Statute system. I will not say too much on this occasion on the matter; as there is dedicated plenary on that subject, during which I shall say more.

I do, however, strongly urge that the review is always kept in the proper perspective.

The review is meant to improve a valuable thing that the world managed to achieve by creating this permanent instrument of accountability. Though it remains a human institution; for which continual improvement will always be necessary and must be encouraged, as for all other human institutions (especially of its kind).

The review should never permit doubt to vex the mind about the Court's value. The ICC is indeed a most profound and valuable multilateral achievement for many generations past and to come.

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Speaking of value, I have often heard it intoned that stakeholders want to see 'results.'

In that regard, I must urge that it is always important for us to remind ourselves from time-to-time that the Court is not a regular type of international institution. It is – first and foremost – a court of law. I restate a point so obvious: precisely because it needs restating.

In the movie *Casablanca*, we may recall the dialogue in which Humphrey Bogart's character, Rick Blaine the Barman, remonstrates with two state agents in the following words: *'You'll excuse me, gentlemen. Your business is politics, mine is running a saloon.'*

I should similarly insist that the Court's business is not to produce tangible commodities and services that are readily quantifiable and measurable – in the form of 'results' – for the attachment of value. The Court's business is the administration of justice. And in the nature of things, justice is a concept that defies easy framing in both definition and ascription of value.

One important legal philosopher once tried to explain it in the following useful way:

*'Justice is not some "thing", which can be captured in a formula once and for all; it is a process, a complex and shifting balance between many factors, including equality.'*¹

And another succinct attempt to explain the central principle of criminal justice comes in the form of a ratio - expressed as 10:1. It is famously called the Blackstone ratio, named after William Blackstone, the famous 18th century jurist who handed it down in the following words: *'It is better that ten guilty persons escape than that one innocent person suffer.'*

That may well give an appreciable dimension to the principle of justice, which requires that the accused person must be acquitted of the crimes charged, when guilt is not proved beyond reasonable doubt. Of course, that principle is no more or less important than Justice Benjamin Cardozo's own calibrating dictum which says: *'Justice, though due to the accused, is due the accuser also. The concept of fairness cannot be strained till it is narrowed to a filament. We are to keep the balance true.'*

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But, either way, no one who believed or believes in the original idea of this Court should doubt its present value. And we may find that value in the phenomenon that no suspect or their friends and associates would embrace the risk of prosecution at the Court: notwithstanding that ICC judges have an undeniable

¹ R W M Dias, *Jurisprudence*, 5th edn (1985), p 66.

reputation for acquitting defendants, when guilt is not established to the required degree. And that risk-aversion may help to explain the anxiety that the Court has aroused in the minds of those who subject it to aggressive bullying, wishing its disappearance.

But, in that risk-aversion lays, still, the value of deterrence. And that value is evident, amongst other things, in the decreased incidence of electoral violence in my own region of Africa. I am in a position to inform you, in that regard, that I have received testimony in the context of an actual trial in which I sat as a presiding judge at the ICC: and heard evidence to the effect that the ICC and its proceedings have had the effect of reducing election violence in a country where such violence had become routine, cyclical, and ever-growing in the past.

Similar information has been related directly to me by leaders of States and of civil societies, who have credited the ICC and its work with reduction in electoral violence in their own countries.

We may also find some significance in the paradox that there are some strong men of power who do not want to leave political office, out of fear that they may end up answering questions of accountability at the ICC.

Those, I must insist, are testament to the important value that the ICC has added to the world, though the project remains imperfect and needs continuous improvement.

Those aspects of the story must not be ignored, if we must speak of the ICC's value in terms of 'results'. And they speak amply to your money well spent in the investment of humanity you have made in funding this Court.

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In the end, it is also possible to consider the Court's value from these related questions: Is there no value in showing through the transparent process of judicial proceedings how the victims' quest for justice is resolved in a particular case – even if that transparent process results in an acquittal in the end?

And, even in such instances when the judicial process results ultimately in an acquittal, can we validly say that there is no value of deterrence to be had, where the proceedings have served to underscore how seriously the international community - through the agency of the Court - reproaches the conduct being prosecuted, as long as the prosecution is not undertaken solely for that reason or undertaken frivolously?

I do not answer these questions now. I merely place them on the table, as we assess the value we must attach to this Court. And I do so only to insist that great care is called for in considering 'results' in simplistic terms. This is especially so, in circumstances of the unfortunate suggestion that the Prosecution has 'failed' in their mandate; whenever there is an acquittal at the end of a trial. That, ladies and gentlemen, is an evaluation that I do not share.

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But, beyond all that, it is also important to highlight the ICC's potential in contributing to sustainable economic development in societies that come within its jurisdiction. This is in the manner of accepting that there cannot be economic development in societies that are gripped by armed conflicts or the extreme forms of human rights violations that the Rome Statute proscribes as international crimes.

For one thing, beyond all the destruction, the mayhem and the fear, such circumstances will generate brain-drain from the countries in question, and migrant flows, into safer and more stable societies that are often not prepared to take in all the numbers. Global experience has shown that physical barriers (natural or constructed) are not truly effective in keeping out such migration flows.

The existence of the ICC and its work serve to exert the needed pressure against the conducts that generate such disruptive circumstances.

We must continue to promote awareness of the ICC's value from those perspectives. As President of the Court, I have used every opportunity to do that. I urge you to do the same.

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Ladies and Gentlemen:

I said earlier that the ICC is indeed a most profound and valuable multilateral achievement for many generations past and to come. In closing, allow me to return to that theme.

And that is to say: that achievement need only be viewed in the light of the unique historical circumstances in which it occurred.

The Court's founding treaty was adopted during a rare window of opportunity in global politics; following the previous decades of the Cold War - during which efforts to create the Court had been dismissed as mere wishful thinking.

The 1990s during which the ICC was created was a period that I have often described as a 'lucid moment in time'. It was a time of new-found optimism and willingness for international collaboration, to overcome deep geopolitical divisions. It came in the wake of unprecedented openness - some of the initial hall-marks of which were *glasnost* and *perestroika*.

That global gale of the time ultimately blew down the Berlin Wall and the apartheid regime and Nelson Mandela came home from prison.

For a moment in time, the spirit of humanity was allowed to feel the tingling air of spring time, with all the hope it brings.

Notably, during that lucid moment, the UN Security Council managed to achieve agreement for the creation of the first two modern international criminal tribunals: the ad hoc tribunals for the former Yugoslavia, and for Rwanda – respectively in 1993 and 1994. A year later - in 1995 - the UN General Assembly also managed to launch formal negotiations for the creation of a permanent international criminal court.

And the spirit of the lucid moment lingered long enough for the Rome Statute to be adopted three years later - in 1998.

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But, now, we know, the lucid moment of the 1990s has become something of a stationary object in the rear view mirror, as our common humanity drives down what often feels like the lane of constant pain.

And, dear friends, that perspective does truly underscore an enduring value for the ICC as a permanent institution: in the manner of the aphorism which holds that we don't know the value of what we have until we don't have it.

For, looking at the current state of geopolitics that plays out in the pivotal forum of the UN Security Council, it must almost seem a pipedream to hope for an achievement today, which is similar to the creation of the ICC – or even the ad hoc tribunals.

That is why I implore that we cannot afford to take the existence of this Court for granted. The opportunity to repeat that feat may never come again.

Let us all cherish and protect this Court, with all the zeal and all the passion that we can muster.

Thank you. ◆◆◆